SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 20

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

FILED SEPTEMBER 14, 1956

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[fol. 2] **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION**

Civil Action No. 624 N.D.

A. W. SCHAFFER, d/b/a SCHAFFER TRANSPORTATION COMPANY, and AMERICAN TRUCKING ASSOCIATIONS, INC., Plaintiffs

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Defendants

---

COMPLAINT—Filed August 8, 1955

Come now A. W. Schaffer, doing business as Schaffer Transportation Company, and American Trucking Associations, Inc., plaintiffs herein, and for their cause of action state:

I

Jurisdiction

This is an action to suspend, enjoin, annul and set aside a report on reconsideration and orders of the defendant, Interstate Commerce Commission, and arises under the provisions of Section 205 (g) of the Interstate Commerce Act, 49 U.S.C. §305 (g), Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and Sections 1336, 1398, 2284, and 2321 to 2325 of the Judicial Code, 28 U.S.C. §§1336, 1398, 2284 and 2321 to 2325. The United States of America is named as a defendant pursuant to Section 2322 of the Judicial Code, 28 U.S.C. §2322.

II

Parties

Plaintiff, A. W. Schaffer, of Revillo, South Dakota, doing business as Schaffer Transportation Company, is a com- [fol. 3] mon carrier by motor vehicle engaged in transportation of granite and other commodities in interstate commerce pursuant to authority granted by the defendant,

Interstate Commerce Commission, under Docket No. MC–93529. Plaintiff is the applicant in Docket No. MC–93529 (Sub-No. 2), the proceeding described in Paragraph III hereof, and is sustaining continuing and irreparable injury as a result of the report and orders complained of.

Plaintiff, American Trucking Associations, Inc., (hereinafter called A.T.A.) is a voluntary non-profit corporation organized under the laws of the District of Columbia, with offices at 1424 Sixteenth Street, N.W., Washington 6, D. C., and is the national organization of the trucking industry, owned and maintained by said industry. Plaintiff A.T.A. was authorized to intervene and participate in the proceeding in Docket No. MC–93529 (Sub-No. 2), as set forth in Paragraph III hereof. The report and orders of the Commission, described in Paragraph III, adversely affect the interests of Plaintiff's members, who constitute a class too numerous to name individually and for whom it customarily appears in proceedings before the Interstate Commerce Commission and the Courts.

III

Statement of the Case

By application filed May 28, 1951, as amended, plaintiff, A. W. Schaffer, doing business as Schaffer Transportation Company, sought from the defendant, Interstate Commerce Commission, a certificate of public convenience and necessity authorizing operations, in interstate commerce, as a common carrier by motor vehicle of granite, manufactured and rough, (1) from points in Grant County, South Dakota, [fol. 4] to points in ten states (primarily in the East) and the District of Columbia, and (2) from points in Vermont to points in sixteen states (primarily in the Midwest), where Division 5 found there are no motor carriers operating affording a similar service. After appropriate proceedings the report and order of Division 5 of the Commission in Docket No. MC–93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, dated May 24, 1954, attached hereto and made a part hereof as Appendix A, found that the public convenience and necessity required plaintiff's proposed operations substantially as requested, that plaintiff was

fit, willing and able properly to perform such service and to conform to the applicable laws and regulations and that a certificate authorizing such operations should be granted.

Following petition of numerous protestant railroads Division 5, by order of November 12, 1954, reopened the proceeding in Docket No. MC-93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, for reconsideration on the same record. Subsequently, the entire Commission assumed jurisdiction of the proceeding and in a six to four decision, with one commissioner not participating, reversed Division 5's decision. The report and order of the Commission dated February 7, 1955, (63 M.C.C. 247), is attached hereto and made a part hereof as Appendix B,* and states that the record does not sustain the prior finding that public [fol. 5] convenience and necessity required the proposed operations, and ordered the prior order of May 24, 1954 (Appendix A), vacated and set aside.

By petition dated March 4, 1955, Plaintiff Schaffer Transportation Company requested reconsideration by, and oral argument before, the defendant Interstate Commerce Commission. By petition dated March 9, 1955, plaintiff A.T.A. requested leave to intervene, reconsideration by, and oral argument before defendant Interstate Commerce Commission. By order of May 16, 1955, attached hereto and made a part hereof as Appendix C, the defendant Interstate Commerce Commission granted leave to intervene to plaintiff A.T.A., but denied the petitions for reconsideration and oral argument of both plaintiffs.

Plaintiffs through the various procedural steps referred to have exhausted their administrative remedies before the Interstate Commerce Commission.

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* In the printed advance sheet attached as Appendix B, the government printing office showed Commissioners Cross, Arpaia, and Clarke as the only dissenters. However, in the original mimeographed order issued by the Commission, it shows that Commissioner Winchell also dissented. The minutes of the Commission's meeting for February 7, 1955, we are informed, also show that Commissioner Winchell dissented from the majority when a vote was taken on the disposition of the proceeding.

IV

Grounds for Relief

The Interstate Commerce Commission, in making and issuing the report and orders complained of (Appendix B and C) exceeded its powers and authority delegated under law and erred as a matter of fact and as a matter of law in the following particulars:

(a) The finding of the Commission that plaintiff A. W. Schaffer's operations are not required by the public convenience and necessity is contrary to and unsupported by the evidence.

(b) The finding of the Commission that the presently-available railroad service is reasonably adequate to meet the needs of the shippers involved is contrary to and not [fol. 6] supported by evidence.

(c) The finding of the Commission that the main purpose of the shippers involved in supporting the application for the proposed service is to obtain lower rates rather than improved service is contrary to and not supported by the evidence.

(d) The report and orders of the Commission failed to recognize and preserve the inherent advantages of motor-carrier transportation contrary to the provisions of the National Transportation Policy, 49 U.S.C. preceding §1.

(e) The report and orders of the Commission failed to promote safe, adequate, economical and efficient transportation service contrary to the provisions of the National Transportation Policy.

(f) The report and orders of the Commission discouraged and hindered the establishment of sound competitive conditions and promoted monopoly in transportation contrary to the provisions of the National Transportation Policy.

(g) The report and orders of the Commission failed to give effect to the well-established principle of law under Section 207 of the Interstate Commerce Act, 49 U.S.C. Section 307, that shippers are entitled to adequate service by motor vehicle as well as by rail.

(h) The report and orders of the Commission failed to give effect to the well-established principle of law under

Section 207 of the Interstate Commerce Act, 49 U.S.C. §307, that the fact that a particular point has adequate rail service is not sufficient reason for denying a motor carrier's application for a certificate to perform motor vehicle service.

[fol. 7] (i) For the reasons set forth, the report and orders complained of (Appendix B and C) are not in accordance with law or with the evidence, and are unreasonable, arbitrary, capricious, and constitute an abuse of discretion.

V

Prayer for Relief

Wherefore, plaintiffs respectfully pray:

(a) That in accordance with Rule 4 of the Federal Rules of Civil Procedure this Court order process to issue against the defendants, Interstate Commerce Commission and the United States of America.

(b) That in accordance with Section 2284(1) of Title 28 of the United States Code this Court immediately notify the Chief Judge of the United States Court of Appeals for the Eighth Circuit who shall designate two other judges, at least one of whom shall be a circuit judge, to serve as members of the Court to hear and determine this action.

(c) That upon final hearing of this action judgment be entered to suspend, enjoin, annul, and set aside the report and orders of the defendant, Interstate Commerce Commission, complained of herein, and that the Court remand this matter to the Commission for further proceedings consistent with the Court's opinion.

(d) That the Court grant such further relief as it deems just and proper.

Respectfully submitted,

Donald A. Morken, 1100 First National-Soo Line Building, Minneapolis 2, Minnesota, Attorney for A. W. Schaffer, doing business as Schaffer Transportation Company.

[fol. 8] Peter T. Beardsley, Fritz R. Kahn, 1424 Sixteenth Street, N.W., Washington 6, D. C., Attorneys for American Trucking Associations, Inc.

R. G. May, 316 Security Bank Building, Sioux Falls, South Dakota, Attorney for A. W. Schaffer, doing business as Schaffer Transportation Company and for American Trucking Associations, Inc.

Dated: August 8, 1955.

[fol. 9] APPENDIX "A" TO COMPLAINT.

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Submitted May 27, 1953 *Decided May 24, 1954.*

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, of rough and finished granite, (1) from points in Grant County, S. Dak., to points in six states and (2) from points in Washington and Orange Counties, Vt., to points in 16 States, over irregular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

Donald A. Morken and *J. L. Hetland* for applicant.

Frank M. Coyne, R. W. Cronon, James G. Lane, and *Claude G. Metzler* for protestants and interveners in opposition to the application.

DIVISION 5, COMMISSIONERS CROSS, ELLIOTT, AND TUGGLE

BY DIVISION 5:

Exceptions were filed by certain protestants and interveners to the order recommended by the examiner, and applicant replied. Our conclusions differ somewhat from those recommended.

By application filed May 28, 1951, as amended, A. W. Schaffer, of Revillo, S. Dak., doing business as Schaffer Transportation Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes. Wm. M. Dingmann, doing business as Granite City Transfer, hereinafter called Dingmann, class I carriers in western trunkline territory, New England territory railroads, Texas Railroad Association, and eastern railroads (except the Chesapeake & Ohio Railway), oppose the application.

Applicant holds a certificate authorizing, so far as here material, the transportation (1) of granite from points in Grant County to points in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York, and (2) of silican carbide from Niagara Falls, N. Y., steelshot from Mansfield, Ohio, and polishing stucco from Ft. Dodge, Iowa, and Chicago Heights, Ill., to points in Grant County, over irregular routes. The purpose of the [fol. 9A] instant proposal is to enable applicant to enlarge the destination territory of his present granite operations out of Grant County and to institute a new, similar west and southbound service from Vermont origins to the 16 States named in that part of the application. A grant of

this authority would be advantageous to applicant from both an operational and financial standpoint, inasmuch as he would be able to obtain additional traffic and also better balance his over-all operations. He operates 14 tractor-trailer units and one additional tractor, of which six units are used exclusively for the movement of granite. Four units generally are used in the conduct of his private operations, described below. In the event the application is granted, vehicles used in transporting shipments from Grant County to certain eastern destinations, such as Ohio, West Virginia, Maryland and the District of Columbia, would be deadheaded to the Vermont origin area under consideration to pick up west-bound traffic.

There are three granite fabricating plants in the concerned South Dakota territory, some of which have their quarries and finishing plants in separate locations. In 1951, applicant transported a total of 157 loads of granite out of this area. At present, he transports one load a week to points in New York and Pennsylvania and frequently returns with empty equipment. If the proposed service is authorized, he intends to station a dispatcher and several pieces of equipment either at Barre or Montpelier, Vt., and to perform a "shuttle" service between the described South Dakota and Vermont origins. He now offers third-day delivery from Grant County to points in Illinois, Indiana and western Ohio, and fifth-day delivery to upstate New York points. He estimates that an additional day will be required to serve the proposed New England points and from five to eight days the southern and eastern destinations involved. The delivery time from Vermont would be approximately the same as that from Grant County.

In addition to his motor carrier business, to which he devotes about 90 percent of his time, applicant also is connected with several other enterprises. He operates a garage at Alby, S. Dak., owns a farm which from time to time is leased to others, and is a wholesale distributor of feed and other products for the Carey Salt Company. Separate books are maintained for each of these businesses. Applicant's consolidated balance sheet as of December 31, 1951, shows assets aggregating $38,414.62, of which $2,463.06 are current assets; total liabilities of

$16,448.93, including current liabilities of $1,773.93; and a net worth of $21,965.69. His total net income for 1951 was $844.13. Applicant is fit and able, financially and otherwise, properly to conduct the proposed operation.

One shipper supports the authority sought in (1) of the application and two shippers, six receivers and one association support the remaining portion of the application.

The Dakota Granite Company, of Milbank, S. Dak., has [fol. 10] two quarries in Grant County where it quarries granite which it finishes into mausoleums, monuments and building granite. These products are shipped to retail outlets by truck and by rail, principally in less-than-carload quantities. Since shipper's facilities are located about 6½ miles from a rail siding, it must use a local trucker to place tonnage at the railhead which is more expensive and inconvenient than loading directly at its plant. It now satisfactorily uses applicant's existing service two or three times a week and expresses a need for a similar service to the proposed States. If such service were made available, shipper would use it, in addition to other points, seven or eight times a year for the movement of shipments destined to the concerned New England area. At present, it has orders on file from customers in Texas, Arkansas, North Dakota, West Virginia and the New England States. All of these customers have requested delivery by motor carrier. Shipper is developing a new territory for its products in Texas and would like to have motor service available for the transportation of any traffic that may result. In this connection, it states that it cannot, at first, expect orders large enough to require carload shipments and less-than-carload shipments might prove to be too costly for the dealer to handle initially. It estimates that in the beginning only about 24,000 pounds a year would move to that particular area. It now has a contract under which it is shipping by rail substantial quantities of granite to a project in North Dakota near the Canadian border. Motor service also has been requested for the delivery of this traffic. Shipper's customers pay the freight charges and have the privilege of requesting the carrier to be used. In most instances, they request motor service for the movement of their small shipments.

The main reason its dealers at eastern points prefer motor rather than rail service is because they are able to obtain split deliveries in small quantities at a reasonable cost. Furthermore, shipments moving by motor carrier arrive at their destinations faster and usually without being damaged. From the shipper's standpoint, it is also more economical to use applicant's service rather than rail because the cost of cartage to the rail siding is eliminated and the crating of the monuments need not be so extensive. Shipper has not used the service of intervener Dingmann in the past two years primarily because of rate considerations. Moreover, it prefers to use a carrier whose equipment is stationed near its place of business. It takes Dingmann three hours from St. Cloud, Minn., to pick up a shipment after being called, whereas shipper can obtain a truck from applicant in 30 minutes.

[fol. 10A] Osborne-Peterson, Inc., of St. Paul, Minn., a retail monument dealer, fabricates and letters granite monuments and markers. It receives both rough and finished granite from Vermont exclusively by rail, mainly in carload lots, and intends to continue using that service. Less-than-carload service is used when pool-car service is not available and there is a rush for a particular shipment. Dealer received one such shipment during the period from January 1 to June 13, 1952. That shipment which weighed 2,540 pounds, and consisted of five polished granite markers, separately crated, was shipped on April 28, and received on May 27. One of the crates was broken in transit and all the markers were damaged, thus rendering them unsuitable for the purpose for which they were ordered. As a rule, the transit time on less-than-carload traffic ranges from 3½ to 6 weeks. Dealer's interest in the proposed operation is motivated by its desire to receive less-than-carload traffic faster and in better condition than it is now arriving, especially during the two months preceding Memorial Day, which is its busiest season. Under existing conditions, a monument should be delivered at its place of business some time in March to assure Memorial Day installation. If authorized, dealer estimates it would use the proposed service six or eight times a year for the movement of either truckload or less-than-truckload shipments.

A dealer at Hutchi-son, Kans., retails public and private memorials to customers located generally in the southwest corner of Kansas. He purchases from 40,000 to 60,000 pounds of finished granite annually from manufacturers at Barre, Vt., which tonnagewise amounts to approximately six less-than-carload and four pool-car shipments. This traffic moves over multiple-rail lines to Kansas City, the break-bulk point, then is delivered to the consignee either by local rail or motor service. Dealer's testimony relative to the transit time involved on shipments from Vermont is conflicting, however, it appears that although over a period of time the average shipment is en route 10 days, a transit time of from 14 to 21 days is not uncommon. In recent years, dealer has experienced a little damage in using rail service, but does not consider it to be undue. He is interested in the proposed operation as it will reduce the amount of crating now necessary to protect the granite, require less handling of the lading, and be faster than existing rail service. Generally, his peak period extends from March to June, with April 1 being the "cut-off" date for Memorial-Day deliveries. Applicant has assured him of a 9-day service, at the most, from Barre, which would be advantageous as it would enable him to extend the deadline for deliveries by as much as two weeks, in some instances. Dealer states that speed is an essential element in the transportation of granite from Vermont and that, if authorized, he would utilize applicant's service mostly for the movement of less-than-truckload shipments involving split deliveries.

[fol. 11] A retail monument dealer at Fremont, Nebr., receives from Vermont origins, in either pool-car or less-than-carload quantities, six or seven shipments of finished granite a year, amounting to approximately 25,000 pounds. The proposed operation would be advantageous to him for several reasons. First, and most important, because it would be faster and more reliable than existing rail service and, thus, enable him to predict with some degree of accuracy when shipments would arrive. This is especially important during the peak season when delivery deadlines must be met and would permit him to compete more effectively with a nearby manufacturer who does his own finishing and who can, with reasonable certainty,

estimate when a particular order will be ready for delivery. Additionally, he would be able to maintain a lower inventory and obtain transportation at a rate somewhat lower than that now in effect on less-than-carload shipments. He receives granite from sources in Minnesota by motor carrier and expresses a need for a similar type of service from Vermont origins.

A retail monument dealer at Moberly, Mo., receives his granite products from Barre by rail, mainly in less-than-carload lots. The transit time in these shipments ranges from 7 to 18 days, with the average being 11.5 days. Because dealer is located on the terminal point of a railroad he considers rail service to be good. However, the proposed service would be advantageous, particularly during the peak season when expeditious service is required.

A monument dealer at Aberdeen, S. Dak., receives from 25,000 to 30,000 pounds of finished granite, except for lettering, a year from Barre. Because of the comparatively small size of his business, he is unable to stock carload quantities of monuments, and it is not practicable for him to utilize pool-car service in conjunction with the other dealers because of the great distances between dealerships. Consequently, he receives all of his freight in less-than-carload lots. These shipments arrive in about 17 days, frequently with the crates broken and, at times, with the monuments damaged. Since dealer has no facilities to repair damaged monuments, any piece of granite damaged must be reordered. The proposed service with its inherent advantages would be beneficial to his business.

A retail monument dealer at Loves Park, a suburb of Rockford, Ill., purchases about 25,000 pounds of custom-designed monuments a year from manufacturers at Barre. These monuments are ready for erection in the cemetary upon arrival, and any damage to them necessitates remanufacturing and, of course, redelivery. All of dealer's monuments move by rail, in less-than-carload lots, and are received monthly in quantities of three or less. The transit time of this traffic averages from three to five weeks. [fol. 11A] In using rail service, dealer has experienced quite some damage, consisting in some instances of monu-

ments being marred by grease or oil, and in other instances, arriving with cracks in them. Formerly, dealer had his shipments delivered directly to his place of business, but because of delays at the railhead, he discontinued that method of operation. He now performs that pickup-and-delivery service himself, receiving an allowance therefor from the railroad in those instances where the latter was to provide the transportation, and is satisfied with such arrangement. He would use the proposed service for the movement of almost all of his traffic.

Jones Brothers Company is engaged principally in the manufacture of granite monuments which are sold generally throughout the United States. So far as here material, all of its shipments originate at Barre and points within a radius of 5 miles thereof. In 1951, it shipped 1,600,000 pounds of granite to customers throughout the affected territory, of which 600,000 pounds moved in less-than-carload quantities and the remainder in either carload or pool-car shipments. Carload service has proven satisfactory, pool-car service not entirely satisfactory, and less-than-carload service unsatisfactory. The principal reason why the second-named method of transportation is not deemed adequate in all respects is because the dealer to whom the consolidated shipment is consigned is held responsible for all the freight involved, regardless of how many other dealers may be participating in the movement. Furthermore, in using this type of service shipper must hold up its orders until sufficient tonnage is accumulated to constitute the pool car. At times, this creates a serious lull between the time the monuments are finished and the time they are shipped. Shipper is dissatisfied with the less-than-carload service because of the length of time the shipments are in transit; the damage that occasionally occurs to some of the merchandise; and the cost involved. It submitted in evidence an exhibit showing the dealers it is now supplying in the destination territory under consideration. Of the 117 named, 7 were in Minnesota, 2 in North Dakota, 6 in Montana, 9 in Colorado, 12 in Wisconsin, 31 in Illinois, 14 in Missouri, 12 in Iowa, 4 in Nebraska, 10 in Oklahoma, 3 in Arkansas, 5 in Texas, and one each in South Dakota and Louisiana. Shipper avers

that many of its small dealers, due to the disadvantages connected with less-than-carload service, are changing their buying habits and purchasing granite at centers where they are able to obtain faster and cheaper motor transportation. In this respect, shipper points out that the lack of motor service is a severe handicap in competing with other producers of granite in Georgia and Minnesota which, it understands, have motor service available to the affected territory. In the event the proposed operation is not authorized, it is considering the possibility of instituting private-carrier operations for the movement of this [fol. 12] traffic. It now uses certain motor carriers to New York and Pennsylvania destinations, but has not tendered these carriers any traffic to the considered area as it understands they do not provide such a service. It is of the opinion that, as a practical matter, a grant of the application would, in the long run, prove beneficial to the railroads because it would be able to acquire new dealers who, although at first may only buy in truckload or less-than-truckload quantities, subsequently could be built up to the point where they would require and buy in carload lots. Shipper desires motor service on a daily basis, if possible, and has no objection to the consolidation of its freight with that of other Barre manufacturers. It would not expect applicant to transport a single 1,000-pound shipment to, say, Greeley, Colo., nor does it anticipate such a situation as that to arise as applicant more than likely would have tonnage from other shippers destined to that general area. It estimates that about 3,000 pounds of granite would be tendered to applicant daily, if his service were made available. It supplies the previously-mentioned dealers at St. Paul and Hutchinson and considers them to be typical customers.

Rock of Ages Corporation quarries granite and manufactures finished monuments and markers, which are distributed throughout most of the United States. It has two plants in Vermont from which shipments to the proposed area are made, one at Montpelier, which is about 7 miles from Barre, and the other at Northfield, some 22 miles from Barre. At the present time, it is endeavoring to build up its distribution to all of its dealers, but particularly

to those in the 16 States here involved, as they have a high agricultural population. In this regard, it has been shipper's experience that farmers provide the best market for its products. Currently, it has 168 dealers throughout the concerned destination territory to whom it ships a little over 5,000,000 pounds of finished granite a year. Of these dealers, 123 purchase in less-than-carload quantities and 45 in carload lots. Whenever possible, pool-car shipments also are made, but such service is not satisfactory because it is difficult for the dealer to whom all of the freight is consigned to pay the charge on the entire lot. Additionally, some dealers frequently have difficulty in collecting promptly from the other dealers participating in the movement, and others, find the task of unloading and reforwarding burdensome. At times, considerable rehandling of tonnage also is required in view of the fact that some dealers are not located on rail sidings. Less-than-carload service, which averages two weeks in transit and sometimes longer, is inadequate because of delays and the damage that occurs to the merchandise. During peak periods, such as Memorial Day, All Souls' Day, and Armistice Day these delays make it difficult for its dealers to meet erection deadlines. Shipper also is faced with the [fol. 12A] disadvantage of having to compete with other granite manufacturers in the south and west which have motor service available. It utilizes motor service throughout New England and portions of New Jersey, Pennsylvania, and New York, but has never been able to obtain service beyond Buffalo, N. Y. It sells to all of the supporting dealers, except the one at Moberly. Like the previous shipper and for the same reason, it believes that the instant proposal, over a period of time, would not only aid its expansion program, but also would be helpful to the railroads from both a tonnage and revenue standpoint. Moreover, it states that there is a need for faster and more frequent service in order to give the smaller dealers who cannot now, due to the capital investment required, carry a representative group of monuments. It is of the conviction that there are excellent opportunities for expansion in such States as Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, and Minnesota and that its salesmen could

successfully take advantage of these opportunities if the proposed service were made available. In the latter event, it would tender to applicant two or more truckloads, ranging from 24,000 to 30,000 pounds, each week.

The Barre Granite Association is a trade association consisting of 77 members all located in the Barre granite producing area. Of these members, 5 are carriers, 5 do custom sawing and polishing of granite and 67 are manufacturers of finished granite products. Included among the latter are the two shippers named immediately above. The function of the Association is to represent its members in traffic and shipping matters. It does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members. The latter ships to all of the States except Nevada. During the period extending from December 1, 1950, to December 1, 1951, this Association arranged for the pool-car movement of 268 cars of granite to 900 dealers in 25 States. Of this tonnage, 156 cars were consigned to dealers in the States covered by this portion of the application. The only motor service it selects is that used for local pickup-and-delivery service at each end of the movement. It favors a grant of the proposed service and would assist its members in making use of it. It states the source of supply of granite in Vermont is limited to the Barre area in Washington County and Williamstown, Vt., in Orange County. The witness representing the association asserted that he also was authorized to represent 18 members of this association at the further hearing herein, on December 2, 1952. However, he was unable to present specific evidence relative to such matters as the tonnage each of the members ships and the particular destination points to which their traffic moves.

[fol. 13] The Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, the Texas and New Orleans Railroad Company, the Central Vermont Railway Company, and Dingmann presented evidence in opposition to the application.

Dingmann operates as a common carrier by motor vehicle, over irregular routes, of finished monumental and structural or partially finished granite from points in Grant County

to points in certain eastern and midwestern States, including Maryland, Vermont, Connecticut, Massachusetts, and the District of Columbia. He has been hauling granite since 1941, and all of his drivers are experienced in the handling of that product. He maintains headquarters about 140 miles from Grant County and operates 10 pieces of equipment which, except during the two-month period preceding Decoration Day, are not fully utilized. If the need arises for more equipment, he is able and willing to supplement his fleet. He offers five- to six-day service from points in Grant County to points in the States just named, and transports about two loads of granite a month from and to these points. Until about 18 months prior to June 13, 1952, the date of the first hearing herein, he provided service, without complaint, to the eastern territory here involved which he is authorized to serve, for the supporting shipper, Dakota Granite Company. He asserts the latter company discontinued using his service solely because it considered his rates to be too high. He desires once again to serve that shipper, stating that his service is similar to that proposed by applicant. He is apprehensive that a grant of the requested authority would deprive him of the eastbound traffic he is now transporting from Grant County.

Milbank is located on the main line of the St. Paul and Pacific Railroad from which point the latter renders direct service to Chicago where connections are made with other rail carriers for service to points and areas involved in the application. The Texas and New Orleans Railroad Company is primarily concerned with the proposed service insofar as it pertains to points in Louisiana and Texas throughout which destination area it, in conjunction with other railroads, offers service. The Central Vermont Railway Company originates granite traffic at four of its stations, namely Barre, Montpelier, Northfield, and Waterbury, Vt., and competes with the Barre and Chelsea Railroad for the outbound movement of granite from that area. All of these rail carriers are ready and able to handle the involved traffic and believe that a grant of the application would have an adverse effect on their operating revenues.

The examiner recommended that the application be granted, except that service from the requested Vermont

origins should be limited to Washington and Orange counties. The following contentions of exceptants, with duplications eliminated, will be disposed of individually or collec-
[fol. 13A] tively in the ensuing discussion, depending upon the category into which they fall.

In their exceptions, certain class I rail carriers in western trunkline territory argue that the examiner erred in giving weight to the incidental inconveniences, such as delays in transit, damage to the merchandise and lack of proper rail sidings, experienced by the supporting shippers; that the latter have available rail service which is adequate generally to meet their transportation needs and support the application mainly because of their desire for lower rates; and that the recommendation of the examiner, if followed by us, would result in the loss of highly desirable traffic and in the diminution of rail revenues, both of which they can ill afford. They also argue that the examiner erred in not permitting their cross-examination of a shipper witness which allegedly would have developed that "huge trucks do more than their share of damage and pay less than their share of the cost." They maintain that such cross-examination should have been permitted since it pertains to the public interest. In the same vein, they request, in the event a need is found for the service proposed, a further hearing for the purpose of permitting them to cross-examine applicant and the shipper witnesses, among other things, on the following matters; (1) whether applicant has damaged or will damage the public highways to the extent indicated in certain issues of Readers Digest, (2) whether applicant's operations from Grant County to points in Maryland would break up the roads to the extent established in the "Maryland road tests of June, 1950" and (3) whether the supporting witnesses agree with the views expressed in another article in Readers Digest. Interveners further assail as error the admission by the examiner of certain testimony touching on the subject of rates, and cite five instances thereof. They, therefore, request that a hearing de novo be granted wherein all evidence of that nature be excluded.

As to the procedural issue raised, the examiner sustained an objection to the following question asked by counsel

for interveners on cross-examination of a shipper witness "Q. Did you see this article on page 41 entitled 'Huge Trucks Do More Than Their Share of Damage, Pay Less Than Their Share of the Cost'"? Irrespective of whether this question may relate to the public interest or not, it manifestly is beyond the scope of the direct examination and the examiner's ruling is sustained.

Concerning interveners' allegation that the examiner erred in admitting certain testimony relative to rates, the record shows that no objection was made to such testimony in three of the cited instances. Furthermore, one of the attorneys representing interveners, which now vigorously condemn the admission of such evidence, was partially responsible by his interrogation for the evidence of this type being presented. In any event, although we agree gen- [fol. 14] erally that testimony of this character should not be admitted in proceedings of this nature we are not persuaded that interveners were prejudiced thereby. Assuming, however, that the referred-to evidence had been excluded, the results herein would not be different. In view of the foregoing, interveners' request for a hearing de novo is hereby denied.

With respect to the request for a further hearing, the record clearly shows that the rail carriers were afforded and took advantage of the opportunity to present and develop facts pertinent to this proceeding. The described information which they seek to elicit at a further hearing, however, would be of no significant probative value nor would it change the conclusion on the ultimate issue to be determined here namely, whether a need has been established for the proposed operation. In the circumstances, the request is denied.

In their exceptions, eastern railroads aver that (1) the examiner was unduly impressed with the fact that there is no direct motor service available to points in the destination territory sought, (2) that his summary of the evidence is neither complete or entirely correct, (3) that applicant has made no study to determine if the proposed operation would be practicable and the evidence shows it would not, (4) that the rail carriers cannot be expected to maintain a dependable and efficient service for the transportation of all

classes of commodities, in whatever quantity offered, if a carrier such as applicant is permitted to enter the field on a "hit or miss" basis in the large area involved, and (5) that although the consignees would find the proposed operation a convenience during certain periods of the year, there is no evidence that applicant would be able to furnish such a service. More specifically, protestants argue that the evidence presented at the further hearing by the witness representing the Barre Granite Association and 18 member companies was hearsay in nature, inaccurately summarized by the examiner, and used to support an erroneous conclusion. They urge that the examiner erred in overruling their objections thereto. In the alternative to a denial of the application, protestants ask for hearing de novo on the ground that applicant failed to provide proper notice to motor carriers competitive with the proposed operations as required by section 5(a) of the Administrative Procedure Act.

We agree with protestants that the evidence adduced by the witness representing the association and 18 of its members, insofar as it related to any need that the 18 members may have for the proposed operation, was largely hearsay, and of no real probative value. Although we try to avoid technicalities, especially in procedural matters, to hold otherwise in this instance would be tantamount to denying protestants the right to cross-examine adverse witnesses, which, of course, is an essential part of a full and com-[fol. 14A] plete hearing. However, since our findings are not predicated upon the evidence which is objected to, protestants have not been prejudiced by the examiner'- rulings, which, in the circumstances, we see no reason to reverse.

Section 5(a) of the Administrative Procedure Act provides in part that "Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof." Our examination of the application indicates that in addition to numerous rail carriers, at least six motor carriers as well as various motor carrier associations were notified of this proposal. Although it is true that only one motor carrier, to a limited extent, opposes the application, in view of the testimony of the various witnesses, it is reasonably clear that there are no motor carriers operating in the considered territory which afford

a service similar to that proposed by applicant. Since the application was publicized as required by law, the fact that motor carriers other than Dingmann have not sought to intervene, standing alone, is not indicative that all persons entitled to notice did not receive it. Protestants' request for hearing de novo is denied.

Dingmann's exceptions are directed to the examiner's recommendation that applicant be authorized to operate from Grant County to points in Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. He points out that the shipper at Milford is not now using his service to and from those points because of rate reconsiderations and argues that the application, to this extent, should, therefore, be denied.

In reply, applicant argues that all of the exceptions are without merit; that the examiner's findings are amply supported by the evidence; and that such findings should be sustained.

As previously indicated, the ultimate question to be resolved herein is whether a need has been established for the proposed operation. This issue cannot be answered affirmatively if both rail and motor carrier services are reasonably adequate. At this point it should be stressed that we agree with exceptants that the level of rates as such is not in issue. We do not agree with them, however, that the supporting shippers, except as hereinafter noted, were motivated, or influenced solely by their desire for lower rates. While the evidence does reveal that the cost of transportation is of interest to them, their views as to the adequacy of existing service cannot be disregarded for that reason.

As seen, the shippers and receivers, other than the Dakota Granite Company, have no for-hire motor service available to them to and from the points covered by the instant application and, consequently, use rail service almost exclusively. They all agree that such service, in the main, is satisfactory for the transportation of carload shipments but entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but [fol. 15] also and primarily from a service standpoint. In this respect, the record shows that on movements of small shipments the supporting witnesses have experienced de-

lays, damage to their merchandise, and have been hampered to some degree by the lack or insufficiency of rail sidings. In many instances, they have been asked by customers to furnish delivery by motor carrier but because of the lack of such service they have been unable to comply with these requests. Moreover, and no less important from a business point of view, the shippers are faced with the competitive disadvantage of having to compete with producers of granite at other locations which have truck delivery available. Then, too, the lack of truck service has impeded shippers' ability to increase their sales and expand their markets in this area. By use of the proposed service, certain other benefits also would accrue to the shippers or dealers. For example, the latter would be able to maintain lower inventories, receive their freight faster and more frequently, and thus, be able better to meet erection deadlines, especially during the peak seasons. Furthermore, the amount of crating now necessary would be reduced with resultant savings in time and money. Unquestionably, some traffic would be diverted from the railroads should the application be granted in whole or in part. However, no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers. In concluding that there is a need for the proposed service to the extent set forth in our findings, we have not overlooked the rail carriers' contention that the proposed service would not be practicable. There is nothing in the record, insofar as we can perceive, to substantiate this contention. In fact, the service proposed would tie in nicely with applicant's existing operation by providing him with return loads from Vermont origins. While his equipment would have to be deadheaded from certain eastern destinations to Vermont, the empty mileage involved would not be excessive so as to warrant the conclusion that the operation would not be feasible. Moreover, the tonnage which would be made available to applicant appears to be sufficient to enable him to provide an efficient and economical service.

The shipper at Milbank insofar as motor service is concerned, is in a somewhat better position than the other two

shippers, as it has available Dingmann's service to certain of the points under consideration, namely, Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. Since the evidence shows that this shipper discontinued Dingmann's service not because his service was unsatisfactory, but solely because of rate considerations, this portion [fol. 15A] of the application will be denied.

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of rough and finished granite (1) from points in Grant County, S. Dak., to points in Wyoming, North Dakota, Texas, Arkansas, Louisiana, and West Virginia, and (2) from points in Washington and Orange Counties, Vt., to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and with our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

COMMISSIONER ELLIOTT DISSENTS.

[fol. 16] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 24th day of May, A. D. 1954.

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date

hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby denied.

By the Commission, division 5.

George W. Laird, Secretary.

(Seal)

[fol. 17] APPENDIX "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Decided February 7, 1955

Upon reconsideration, findings in prior report, decided May 24, 1954, reversed. Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle of rough and finished granite, (1) from points in Grant County, S. Dak., to points in 10 States and the District of Columbia, and (2) from points in Vermont to points in 16 States. Application denied.

Donald A. Morken and *J. L. Hetland* for applicant.

Frank M. Coyne, R. W. Cronon, James G. Lane, Claude G. Metzler, and *J. P. Reedy* for protestants and interveners in opposition to the application.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By application filed May 28, 1951, as amended, A. W. Schaffer, of Revillo, S. Dak., doing business as Schaffer Transportation Co., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite,

manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes. Wm. M. Dingmann, doing business as Granite City Transfer, class I carriers in western trunkline territory, New England territory railroads, Texas Railroad Association railroads, and eastern railroads, except The Chesapeake and Ohio Railway Company, oppose the application.

In the prior report herein, decided May 24, 1954, division 5 found that the public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of rough and finished granite (1) from points in Grant County, S. Dak., to points in Wyoming, North Dakota, Texas, Arkansas, Louisiana, and West Virginia, and (2) from points in Washington and Orange Counties, Vt., to points in South Dakota, Minnesota, North Dakota, Montana, [fol. 17a] Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, and that in all other respects the application should be denied. Thereafter, upon consideration of the record and of petitions of the opposing rail carriers to which applicant replied, by order of November 12, 1954, division 5 reopened the proceeding for reconsideration on the present record. Subsequently, in the interest of expedition, and upon the recommendation of division 5, we assumed jurisdiction of the proceeding.

In their petition, class I western trunkline rail carriers contend (1) that the evidence fails to establish that the presently authorized transportation services are inadequate either because of lack of equipment, length of time in transit, or damage to lading; and (2) that the supporting witnesses are interested in the proposed service merely because they feel that they will obtain motor-carrier transportation at lower rates than the existing rail rates.

The eastern railroads attack the prior report on a number of counts, some of which are repetitions in whole or in part.

Among these are points which were raised in their exceptions to the report of the examiner and were considered by division 5 in the prior report.

The essence of the eastern railroads' contentions are (1) that the supporting witnesses are motivated by a desire for cheaper rates; (2) that the witnesses' expressed desire for more expeditious service should be discounted because of their willingness to allow finished granite to be held for weeks and even months by Vermont producers until a sufficient quantity for a pool car can be accumulated; (3) that the witnesses' testimony is not properly summarized, as certain of them admitted they had not attempted to use existing motor service; certain of them expressed themselves as fairly well satisfied with rail service and had had very little damage on rail shipments; (4) that the testimony of the representatives of the Vermont granite producers is entitled to very little weight as their concerns do not pay the freight charges or control the considered traffic; that the representative of Rock of Ages Corporation was not sufficiently acquainted with the facts to stand cross-examination particularly with respect to his direct testimony that certain Georgia and Minnesota granite producers enjoyed motor-carrier transportation; (5) that the division obviously gave full weight to the testimony of the Vermont producers as it authorized service to points in 10 destination States from which no consignee appeared, and to 6 States from each of which only 1 consignee appeared; (6) that there are many motor carriers whose interline service has not been tried; (7) that the evidence does not establish that applicant would find it economically possible, in view of the small shipments to many scattered points and the deadhead mileage involved, to render the proposed service; [fol. 18] and (8) that a grant of the requested authority would have an adverse effect upon protestant rail lines.

In reply, applicant states that lower costs generally which can be obtained by the use of motor service with the resulting shorter holding time and time in transit, less damage, lower inventories, and less expensive crating, rather than lower rates as such, are the basis of the shippers' support. Applicant concedes that the Vermont granite producers do not pay the freight and that technically the

consignees have the right to control the routing but points out that the consignees ordinarily leave the routing to the producers. Applicant asserts that the many arguments advanced and contentions made by petitioners have already been considered by division 5 in the prior report and are without merit. Applicant requests that the petitions be denied and the order of division 5 affirmed.

Applicant holds a certificate authorizing, so far as here material, the transportation (1) of granite from points in Grant County to points in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York, and (2) of silicon carbide from Niagara Falls, N. Y., steelshot from Mansfield, Ohio, and polishing stucco from Fort Dodge, Iowa, and Chicago Heights, Ill., to points in Grant County, over irregular routes. The purpose of the instant proposal is to enable applicant to enlarge the destination territory of his present granite operations out of Grant County and to institute a new, similar west and southbound service from Vermont origins to the 16 States named in that part of the application. A grant of this authority would be advantageous to applicant from both an operational and financial standpoint, inasmuch as he would be able to obtain additional traffic and also better balance his overall operations. He operates 14 tractor-trailer units and 1 additional tractor, of which 6 units are used exclusively for the movement of granite. Four units generally are used in the conduct of his private operations, described below. In the event the application is granted, vehicles used in transporting shipments from Grant County to certain eastern destinations, such as Ohio, West Virginia, Maryland, and the District of Columbia, would be deadheaded to the Vermont origin area under consideration, to pick up westbound traffic.

There are three granite-fabricating plants in the concerned South Dakota territory, some of which have their quarries and finishing plants in separate locations. In 1951, applicant transported a total of 157 loads of granite out of this area. At present, he transports one load a week to points in New York and Pennsylvania and frequently returns with empty equipment. If the proposed service is au-

thorized, he intends to station a dispatcher and several pieces of equipment either at Barre or Montpelier, Vt., [fol. 18a] and to perform a "shuttle" service between the described South Dakota and Vermont origins. He now offers third-day delivery from Grant County to points in Illinois, Indiana, and western Ohio, and fifth-day delivery to upstate New York points. He estimates that an additional day will be required to serve the proposed New England points and from 5 to 8 days the southern and eastern destinations involved. The delivery time from Vermont would be approximately the same as that from Grant County.

In addition to his motor-carrier business, to which he devotes about 90 percent of his time, applicant also is connected with several other enterprises. He operates a garage at Alby, S. Dak., owns a farm which from time to time is leased to others, and is a wholesale distributor of feed and other products for the Carey Salt Company. Separate books are maintained for each of these businesses.

The Dakota Granite Company, of Milbank, S. Dak., has two quarries in Grant County at which granite is finished into mausoleums, monuments, and building forms. It ships to retail outlets by truck and by rail, principally in less-than-carload quantities. It uses applicant's service 2 or 3 times a week, and finds it very satisfactory. If such service were made available to the destinations here sought, this shipper would use it, in addition to other points, 7 or 8 times a year for the movement of shipments to the New England area. At the time of the hearing, it had orders on file from customers in Texas, Arkansas, North Dakota, West Virginia, and the New England States, all of which were accompanied by requests for delivery by motor carrier. It now has about 35 customers in Connecticut of an estimated 100 dealers in that State. This shipper is developing a new territory for its products in Texas, and desires to have motor service to that State. It does not, at first, expect orders from this new territory to be large enough to justify carload shipments, and fears that less-than-carload shipments by rail might prove to be too costly for the dealer to handle initially. It estimates that in the beginning only about 24,000 pounds a year would move to that particular area. At the time of the hearing it also had in effect a

contract under which it was shipping by rail substantial quantities of granite to a project in North Dakota near the Canadian border, for which motor-carrier service had been requested. Its customers pay the freight charges and have the privilege, if they desire, of designating the carrier to be used. In most instances, they request motor-carrier service for the movement of their small shipments, principally because they, particularly those at eastern points, are able to obtain split deliveries of small quantities at rates lower than less-than-carload rail rates. Furthermore, it has found that shipments moving by motor carrier arrive at their destinations in shorter time and usually without being dam- [fol. 19] aged. This shipper asserts that transportation rates play an important part in determining whether a particular transportation service can be used, especially when shipments are destined to points situated near other granite-producing areas. Also, the shipper would prefer to use applicant's service, rather than rail, because the cost of cartage to the rail siding (6½ miles distant) is eliminated, and the crating of the monuments need not be so thorough. It has not used the service of Dingmann in the past 2 years primarily because of rate considerations; however, it is willing to negotiate with intervener in this respect. Moreover, it prefers to use a carrier such as applicant whose equipment is stationed near its place of business; it has found that Dingmann takes 3 hours from St. Cloud, Minn., to pick up a shipment after being called, whereas it can obtain a truck from applicant in 30 minutes.

Osborne-Peterson, Inc., of St. Paul, Minn., a retail monument dealer, fabricates and letters granite monuments and markers. It receives both rough and finished granite from Barre, Vt., exclusively by rail, principally carload lots, and intends to continue using that service. Less-than-carload service is used when pool-car service is not available and there is a need for immediate movement of a particular shipment. Otherwise it directs that its shipments be held for a carload. From January 1 to June 13, 1952, it received a shipment which weighed 2,540 pounds, and consisted of 5 polished granite markers, separately crated, and which was in transit for 30 days. One of the crates was broken in transit, and all the markers were damaged to a degree ren-

dering them unsuitable for the purpose for which they were ordered. No other complaints were specified. As a rule, the transit time on less-than-carload traffic ranges from 3½ to 6 weeks. This shipper's interest in the proposed operation is motivated by its desire to receive small shipments more expeditiously and in better condition than at present, especially during the 2 months preceding Memorial Day, which is its busiest season. Under existing conditions, it has found that a monument should be delivered at its place of business sometime in March to assure Memorial Day installation. This shipper estimates it would use the proposed service, if authorized, 6 or 8 times a year for the movement of either truckload or less-than-truckload shipments.

A dealer at Hutchinson, Kans., retails public and private memorials to customers located generally in the southwestern section of Kansas. He purchases from 40,000 to 60,000 pounds of finished granite annually from manufacturers at Barre, Vt., which approximates 6 less-than-carload and 4 pool-car shipments. Pool-car shipments move over connecting rail lines to Kansas City where the car is broken down and from whence individual shipments are de- [fol. 19a] livered to the consignee either by local rail or motor service. Although over a long period of time, the average time in transit by rail is 10 days, a transit time of from 14 to 21 days is not uncommon. In recent years, consignee has experienced some damage in using rail service, but does not consider it to be undue. He is interested in the proposed operation because it will reduce the amount of crating now necessary to protect the granite, require less handling of the lading, and be faster than existing rail service. Generally, his peak period extends from March to June, with April 1 being the deadline for Memorial Day deliveries. Applicant has assured him of a 9-day service, at the most, from Barre, which would be advantageous as it would enable him to extend the deadline for deliveries by as much as 2 weeks in some instances. However, this shipper has made no investigation to determine if any motor carriers are now available. He considers that speed is an essential element in the transportation of granite from Barre, but does not expect the proposed service to alter his inventory situation. He would utilize applicant's proposed service principally for less-than-truckload shipments involv-

ing split deliveries, but would be willing to try other motor carriers.

A retail monument dealer at Fremont, Nebr., receives annually from Vermont origins 6 or 7 shipments of finished granite totaling about 25,000 pounds by pool-car and less-than-carload service. He considers that the proposed operation would be advantageous to him because it would be faster and more reliable than existing rail service and, thus, enable him to predict with some degree of accuracy when shipments would arrive. This is especially important during the peak season when delivery deadlines must be met. The proposed service would also permit him to compete more effectively with a nearby manufacturer who does his own finishing and thus can, with reasonable certainty, estimate when a particular order will be ready for delivery. In addition, he would be able to maintain a lower inventory and obtain transportation at a rate somewhat lower than that now in effect on less-than-carload rail shipments. He receives granite from sources in Minnesota by motor carrier and desires a similar type of service from Vermont origins. He has not investigated to determine whether any motor service is available from Vermont.

A retail monument dealer at Moberly, Mo., receives his granite products from Barre by rail, principally in less than carloads. The transit time for less-than-carload and pool-car shipments ranges from 7 to 18 days, with the average being 11.5 days. Because this dealer is located at the terminal point of a railroad, he considers rail service to be good. However, the proposed service would be advantageous, particularly during the peak season when expedi- [fol. 20] tious service is required. He receives granite by motor carrier from the "northwest and from the south" and finds such service very advantageous.

A monument dealer at Aberdeen, S. Dak., receives from 25,000 to 30,000 pounds annually of granite finished except for lettering, from Barre. Because of the comparatively small size of his business, he is unable to stock carload quantities, and it is not practicable for him to utilize pool-car service in conjunction with the other dealers because of the great distances between dealerships. Consequently, he receives all of his freight in less-than-carload lots. Shipments arrive in about 17 days, frequently with the crates broken,

and at times, with the monuments damaged. As this shipper has no facilities to repair damaged monuments, any piece of granite which is damaged must be reordered. He considers that the proposed operation with the inherent advantages of motor-carrier service would be beneficial to his business, particularly where he could hold shipments to accumulate a truckload. This shipper has made no investigation of available motor carriers.

A retail monument dealer at Loves Park, a suburb of Rockford, Ill., purchases about 25,000 pounds of custom-designed monuments a year from manufacturers at Barre. These monuments are ready for erection in the cemetery upon arrival, and any damage in transit necessitates remanufacturing and, of course, reshipment. All of this dealer's monuments move by rail, in less-than-carload lots, and are received monthly in quantities of three or less. The transit time of this traffic ranges from 3 to 5 weeks. In using rail service, this dealer has experienced damage, consisting in some instances of monuments marred by grease or oil, or cracked. Formerly, he had his shipments delivered directly to his place of business, but because of delays at the railhead, he discontinued that method of operation. He now picks up his own shipments, receiving an allowance therefor from the railroad in those instances where the latter was to provide the transportation. He is satisfied with such an arrangement, but would use the proposed service for the movement of all that traffic where delivery time is important. He has not investigated to determine whether or not other motor carriers are available.

Jones Brothers Company, of Barre, is engaged principally in the manufacture of granite monuments which are sold throughout the United States. In 1951, it shipped 1,600,000 pounds of granite to customers throughout the territory here involved, of which 600,000 pounds moved in less-than-carload quantities and the remainder in either carload or pool-car shipments. Carload service is admittedly satisfactory, but neither pool-car nor less-than-carload service is. Pool-car service is not deemed satisfactory in all respects because the first dealer to whom the consolidated shipment [fol. 20A] is consigned is held primarily responsible for all of the freight charges involved, and also the shipper must hold up delivery of orders until sufficient tonnage is ac-

cumulated to constitute the pool car. At times, this causes a long delay between the time the monuments are finished and the date shipped. This shipper is dissatisfied with less-than-carload service because of the length of transit time, the damage that occasionally occurs, and the cost involved. However, the usual transit time of less-than-carload shipments varies from 1 to 2 weeks. Of 117 dealers it presently supplies in the destination territory under consideration, 7 are in Minnesota, 2 in North Dakota, 6 in Montana, 9 in Colorado, 12 in Wisconsin, 31 in Illinois, 14 in Missouri, 12 in Iowa, 4 in Nebraska, 10 in Oklahoma, 3 in Arkansas, 5 in Texas, and 1 each in South Dakota and Louisiana. These dealers as a rule pay all the freight charges. This shipper finds that many of its small dealers, due to the disadvantages of less-than-carload service, are changing their buying habits and purchasing granite at centers where they are able to obtain faster and cheaper motor transportation. It considers the lack of motor service a severe handicap in competing with other producers of granite in Georgia and Minnesota which, it understands, have motor service available to the destination territory here considered. In the event the proposed operation is not authorized, it is considering instituting private-carrier operations for the movement of this traffic. It now uses certain motor carriers to New York and Pennsylvania destinations, but has not tendered these carriers any traffic to points in the considered area as it understands they do not provide service thereto. It is of the opinion that a grant of the application would eventually prove beneficial even to the railroads because it would be able to acquire new dealers who, as their businesses developed, might become carload purchasers. This shipper desires motor service on a daily basis, if possible, and has no objection to the consolidation of its freight with that of other Barre manufacturers. It would not expect applicant to transport a single 1,000-pound shipment to, for example, Greeley, Colo., nor does it expect such a situation to arise as it believes applicant will have tonnage from other shippers destined to that general area. It estimates that about 3,000 pounds of granite would be tendered to applicant daily, if his services are available. It supplies the above-mentioned dealers at St. Paul and Hutchinson, and

considers them to be typical customers with respect to their volume and type of business.

Rock of Ages Corporation quarries granite and manufactures finished monuments and markers which are distributed throughout most of the United States from 2 plants, 1 at Montpelier, Vt., 7 miles from Barre, and the other at Northfield, Vt., 22 miles from Barre. At the present time, it is endeavoring to build up its distribution to all of its dealers, [fol. 21] but particularly to those in the 16 States here involved, as they have a high agricultural population. In this regard, it has been this shipper's experience that farmers provide the best market for its products. At present it has 168 dealers throughout the considered destination territory to whom it ships over 5,000,000 pounds of finished granite a year, exclusive of slabs and unfinished granite which move in carloads. Of these dealers, 123 purchase in less-than-carload quantities and 45 in carload lots. Whenever possible, pool-car shipments are made, but such service is not satisfactory because it is difficult for the first dealer to whom all of the freight is consigned, to pay the charge on the entire lot. In addition, some dealers have difficulty in collecting promptly from the other dealers who are consignees of the balance of the car, and others find the task of unloading and reforwarding burdensome, particularly where they are not located on rail sidings. The producer holds shipments 1 to 4 weeks to accumulate a carload. Less-than-carload service, which averages 2 weeks to transit and sometimes longer, is inadequate because of delays and damage to merchandise. Its crating of merchandise is the same for both rail- and motor-carrier loading. During peak periods, such as Memorial Day, All Soul's Day, and Armistice Day delays make it difficult for its dealers to meet delivery dates. This shipper also is faced with competition from other granite manufacturers in the South and West, which, it understands, have motor service available. It utilizes motor service throughout New England and portions of New Jersey, Pennsylvania, and New York, but has never been able to obtain such service to points beyond Buffalo, N. Y. It sells to all of the supporting dealers, except the one at Moberly. It also is of the opinion that the instant proposal, over a period of time, would not only aid

its own expansion program, but would also be helpful to the railroads from both a tonnage and revenue standpoint. Moreover, it contends that there is a need for faster and more frequent service in order to give the smaller dealers who cannot now, because of the capital investment required, carry in stock a representative group of monuments. It is of the opinion that there are excellent opportunities for expansion in such States as Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, and Minnesota, and that its salesmen could successfully take advantage of these opportunities if the proposed service were available. In the event the authority sought is granted, it would tender to applicant 2 or more truckloads of from 24,000 to 30,000 pounds, each week.

The Barre Granite Association is a trade association consisting of 77 members, all located in the Barre granite producing area. Of its members, 5 are carriers, 5 do custom [fol. 21A] sawing and polishing of granite, and 67 are manufacturers of finished granite products. Included among the latter are the two shippers named immediately above. The function of the association is to represent its members in traffic and shipping matters. It does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members. During the period December 1, 1950, to December 1, 1951, this association arranged for the pool-car movement of 268 cars of granite to 900 dealers in 25 States. Of this tonnage, 156 cars were consigned to dealers in the States covered by this application, insofar as it proposes service from Vermont. The only motor service it selects is that used for local pickup and delivery service at each end of the movement. It favors a grant of the authority sought, and would assist its members in making use of it. It states that the source of supply of granite in Vermont is limited to the Barre area in Washington County, and Williamstown, Vt., in Orange County. The witness representing the association was also authorized to represent 18 individual members of this association for the purpose of stating that their position is the same as that set forth by the 2 preceding shippers. However, he was unable to present specific evidence concerning the tonnage each of the members ships or the particular points to which their traffic moves.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Texas and New Orleans Railroad Company, the Central Vermont Railway, Inc., and Dingmann presented evidence in opposition to the application.

Dingmann operates as a common carrier by motor vehicle, over irregular routes, of finished monumental and structural or partially finished granite from points in Grant County to points in certain Eastern and Midwestern States, including Maryland, Vermont, Connecticut, Massachusetts, and the District of Columbia. He has been hauling granite since 1941, and all of his drivers are experienced in the handling of that product. He maintains headquarters about 140 miles from Grant County and operates 10 pieces of equipment which, except during the 2-month period preceding Decoration Day, are not fully utilized. If the need arises for more equipment, he is able and willing to supplement his fleet. He offers 5- to 6-day service from points in Grant County to points in the States just named, and transports about 2 loads of granite a month from and to these points. Until about 18 months prior to June 13, 1952, the date of the first hearing herein, he provided service, without complaint, to the eastern territory here involved which he is authorized to serve for the supporting shipper, Dakota Granite Company. He asserts the latter company discontinued using his service solely because it considered his rates to be too high. [fol. 22] He desires once again to serve that shipper, stating that his service is similar to that proposed by applicant. He is apprehensive that a grant of the requested authority would deprive him of the eastbound traffic he is now transporting from Grant County.

Milbank is located on the main line of the Chicago, Milwaukee, St. Paul and Pacific Railroad from which point the latter renders direct service to Chicago where connections are made with other rail carriers for service to points and areas involved in the application. The Texas and New Orleans Railroad Company is primarily concerned with the proposed service insofar as it pertains to points in Louisiana and Texas, throughout which destination area it, in connection with other railroads, offers service. The Central Vermont Railway, Inc., originates granite traffic at four of its stations, namely, Barre, Montpelier, Northfield, and Waterbury, Vt., and competes with the Barre and Chelsea

Railroad Company for the outbound movement of granite from that area. All of these rail carriers are ready and able to handle the involved traffic and believe that a grant of the authority requested would detrimentally affect their revenues.

On the foregoing facts, we are unable to conclude that the public convenience and necessity require the proposed operation. It is seen that for one reason or another the supporting witnesses find fault with the presently utilized rail service. Actually, however, the evidence warrants the conclusion that the witnesses are reasonably satisfied with rail service except for the one complaint that all share, namely, that rail service is too slow. Nevertheless, it is the practice for the Vermont shipper to hold finished granite until they can accumulate a pool-car load in order that the shipments may move at the lower pool-car rate. This practice is followed with the knowledge and consent of the consignees, and the sole purpose therein is to take advantage of the lower rail rate. Less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses. The testimony of the South Dakota shipper also indicates that its support of the application is largely motivated by anticipated cheaper transportation.

We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied.

All of the contentions of the parties have been considered even though not specifically discussed. In view of our con- [fol. 22A] clusions herein it is unnecessary to consider the question of applicant's fitness to conduct the proposed service.

Upon reconsideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

An order will be entered, vacating and setting aside the order of May 24, 1954, and denying the application.

Commissioners Cross, Arpaia, and Clarke dissent.

Commissioner Hutchinson, being necessarily absent, did not participate in the disposition of this proceeding.

[fol. 23] Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of February, A. D., 1955.

No. MC-93529 (Sub No. 2)

A. W. Schaffer Extension—Granite

It appearing, That on May 24, 1954, the Commission, division 5, entered its report and order in the above-entitled proceeding granting to applicant a certificate authorizing him to conduct certain operations as a common carrier by motor vehicle, in interstate or foreign commerce, and denying the application in all other respects;

It further appearing, That upon consideration of the record, and of petitions of protestants and interveners, for reconsideration, and of reply by applicant, by order of November 12, 1954, the proceeding was reopened for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved in this proceeding has been given, and that the Commission, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the report of May 24, 1954, are hereby referred to and made a part hereof:

It is ordered, That the said order of May 24, 1954, be and it is hereby, vacated and set aside.

And it is further ordered, That said application be, and it is hereby, denied.

By the Commission.

George W. Laird, Secretary.

(Seal)

[fol. 23A] APPENDIX "C" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 16th day of May, A. D., 1955.

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE
(Revillo, S. Dak.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Barre Granite Association, Jones Bros. Company, and Rock of Ages Corporation, for leave to intervene oral argument and reconsideration, dated March 4, 1955;
(2) Petition of American Trucking Associations, Inc., for leave to intervene, reconsideration, and oral argument, dated March 9, 1955;
(3) Petition of applicant for reconsideration and oral argument, dated March 4, 1955;
(4) Reply of Eastern Railroads (except Chesepeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition in (1) above;
(5) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition for intervention in (2) above;
(6) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition for reconsideration in (2) above;
(7) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated April 8, 1955;
(8) Reply of certain Class I Western Trunk Line rail carriers, protestants, dated April 7, 1955, to petition in (3) above;

and good cause appearing therefor;

It is ordered, That said petitioners, Barre Granite Association, Jones Bros. Company, Rock of Ages Corporation, and American Trucking Associations, Inc., be, and they are hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings herein;

[fol. 23B] *It is further ordered*, That said petitions for reconsideration and oral argument be, and they are hereby, denied, for the reason that the discussion and findings of the Commission are substantiated by the record, and are in accordance with the law applicable thereto, and neither reconsideration nor oral argument is justified.

By the Commission.

Harold D. McCoy, Secretary

(Seal)

[fol. 26] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—
Filed September 30, 1955

The Interstate Commerce Commission, one of the defendants in the above-styled proceeding, for answer to the complaint says:

1.

The Commission admits for the purposes of this action the allegations of paragraph I.

2.

Answering the first section of paragraph II, the Commission admits the same, except that the Commission denies that plaintiff A. W. Schaffer, d/b/a Schaffer Transportation Company, is sustaining continuing and irreparable injury as a result of the reports and orders of the Commission.

Further answering the second section of paragraph II, the Commission admits the same, except that it denies the [fol. 27] allegation that its reports and orders adversely affect the interest of the members of the American Trucking Associations, Inc.

3.

Answering paragraph III, the Commission admits the same, except that it refers the Court to the report of the Commission, Division 5, dated May 24, 1954, and the report and order of the Commission dated February 7, 1955 (Appendices A and B to the bill of complaint) for a complete and accurate statement of its findings and conclusions.

4.

Answering paragraph IV, the Commission denies the allegations thereof and denies that it exceeded its powers and authority delegated to it under law in its determination of this proceeding.

The Commission avers that its findings in its report dated February 7, 1955, are supported by substantial evidence of record, which is set forth in said report.

The Commission further avers that the other allegations in this paragraph are argumentative in nature, to which no answer is required.

The Commission further avers that its report and order of February 7, 1955, fully complies with the provisions of the Administrative Procedure Act and with all other statutory and judicial requirements, and the Commission further avers that its action in this proceeding was neither unreasonable, arbitrary, capricious nor in abuse of its discretion.

5.

Except as expressly admitted herein, the Commission denies each and all the allegations in said complaint to the extent that they are inconsistent with the averments of this [fol. 28] answer or inconsistent with the findings and conclusions of the aforesaid report and order of February 7, 1955.

All of which matters and things the Commission is ready

to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By: H. Neil Garson, Attorney

Samuel R. Howell, Acting General Counsel, Of Counsel

[fol. 29] Certificate of Service (omitted in printing).

[fol. 31] In the United States District Court for the District of South Dakota, Northern Division

[Title omitted]

Answer of United States of America—
Filed October 6, 1955

Now comes the United States of America, defendant, and for answer to the complaint of plaintiffs filed in the above-entitled action, admits, denies and avers as hereinafter set forth:

I

The defendant admits the allegations of paragraph I of the complaint.

II

Answering the first sub-paragraph of paragraph II of the complaint, the defendant admits the same, except the allegation that the plaintiff is sustaining continuing and irreparable injury as a result of the report and orders of the Commission, which is denied.

Answering the second sub-paragraph of paragraph II of the complaint, the defendant admits the same, except the allegation that the report and orders of the Commission adversely affect the interest of the members of American Trucking Associations, Inc., which is denied.

III

The defendant admits the allegations of paragraph III of the complaint, except that it refers the Court to the

report and order of Division 5 of the Commission in Docket No. MC-93529 (Sub-No. 2, dated May 24, 1954, for a full and complete statement of its findings and conclu-
[fol. 32] sions. The defendant avers that the said report and order of Division 5 of the Commission, dated as aforesaid, is not the final report and order of the Commission. Defendant further avers that the Commission denied the said petitions mentioned in paragraph III, sub-paragraph 3, for the reasons stated in its order of May 16, 1955, which order is attached to the complaint as Appendix C.

IV

The defendant denies the allegations contained in paragraph IV including sub-paragraphs (a) to (i), inclusive, of the complaint.

V

The United States of America, further answering the complaint, alleges that all the parties to the proceeding before the Interstate Commerce Commission were given a full and complete hearing; that the findings and conclusions in said reports and orders under attack herein were and are fully supported and justified by the evidence submitted in said proceeding; and that in making said report the Interstate Commerce Commission carefully considered and applied the criteria fixed by law; considered and weighed the national transportation policy; and considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition required by law to be considered; and weighed, as well, each fact, circumstance and condition called to its attention by the parties to said proceedings by their respective counsel or otherwise; and that said report and orders were not made or entered arbitrarily or unjustly and contrary to law; and that in making said report and order the Commission did not exceed the authority conferred upon it by law; and this defendant denies each and every allegation contained in the complaint in conflict with the allegations of this paragraph; and except as expressly admitted in this answer this defendant denies each and all of the allegations of the complaint.

Wherefore, having fully answered, the United States of America prays that the relief sought in the complaint be [fol. 33] denied and the complaint be dismissed with costs assessed against the plaintiffs, and that it have such other, further and different relief as to the Court may seem meet, just and equitable in the premises.

Dated: September 28th 1955

James E. Kilday, Edward Knuff, Attorneys for United States of America, Department of Justice, Washington, D. C.

Stanley N. Barnes, Assistant Attorney General, Clinton G. Richards, United States Attorney

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Certificate of Service (omitted in printing)

[fol. 35] In the United States District Court
District of South Dakota, Northern Division

[Title omitted]

Motion and Notice of Motion of Intervening Railroads for Leave to Intervene—Filed December 27, 1955

The Akron, Canton & Youngstown Railroad Company and the other railroads named in Exhibit A attached hereto move for leave to intervene as parties defendant in this action in order to assert the claims and defenses set forth in their proposed Answer herein, copy of which is attached hereto, and to obtain the relief sought in such pleading, on the ground that they are entitled to intervene on their own motion and as of right (28 U. S. C. 2323).

The Akron, Canton & Youngstown Railroad Company, and the others named in Exhibit A attached hereto, By H. F. Chapman, Attorney

[fol. 36] APPENDIX A TO MOTION

Akron, Canton & Youngstown Railroad Company, The
Ann Arbor Railroad Company, The
Atchison, Topeka and Santa Fe Railway Company, The
Baltimore & Ohio Railroad Company, The
Boston and Maine Railroad
Central Railroad Company of New Jersey, The
Central Vermont Railway, The
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Delaware and Hudson Railroad Corporation, The
Delaware, Lackawanna and Western Railroad Company, The
Denver and Rio Grande Western Railroad Company, The
Detroit and Toledo Shore Line Railroad Company, The
Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railroad Company, The (P. L. Solether, Trustee)
Elgin, Joliet and Eastern Railway Company
Erie Railroad
Fort Dodge, Des Moines & Southern Railway Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Kansas City Southern Railway Company, The
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Midland Valley Railroad Company
Minneapolis & St. Louis Railway Company, The
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)

[fol. 37] New York Central System
New York, Chicago and St. Louis Railroad Company, The
New York, New Haven and Hartford Railroad Company, The
New York, Ontario and Western Railway Company
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway
Northern Pacific Railway Company
Pennsylvania Railroad Company, The
Pittsburgh & West Virginia Railway Company
Reading Railway System
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Southern Pacific Company
Texas and Pacific Railway Company, The
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Wabash Railroad Company
Western Maryland Railway
Western Pacific Railroad Company, The

[fol. 41] IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

[Title omitted]

ORDER PERMITTING INTERVENTION—December 27, 1955

The Akron, Canton & Youngstown Railroad Company, et al., having presented motion for leave to intervene as defendants in the above-entitled proceeding, it appearing to the Court that plaintiffs herein have been served with copy of said motion, have waived hearing thereon, and have consented to said intervention;

It is hereby ORDERED that the Akron, Canton & Youngstown Railroad Company and the other railroads named in Exhibit A attached to said motion are hereby permitted to intervene in said cause in accordance with Title 28, United States Code, Section 2323, and Rule 24 (a) of the Rules of Civil Procedure.

Dated: December 27th, 1955.

/s/ George T. Mickelson, U. S. District Judge.

(Seal of Court)

Attest: /s/ Roy B. Marker, Clerk. By Marguerite E. Casanova, Deputy.

(Seal)

[fol. 43] IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

[Title omitted]

ANSWER OF INTERVENING RAILROADS—
Filed December 27, 1955

The Akron, Canton & Youngstown Railroad Company and the other railroads named in Exhibit A attached hereto, interveners herein, for answer to the complaint state:

1.

Each intervener is a corporation duly organized and existing and is a common carrier of property for hire by railroad. Most of the interveners were parties in interest to the proceeding before the Interstate Commerce Commission (hereinafter referred to as Commission) in No. MC-93529 (Sub-No. 2), A. W. Schaffer, d/b/a Schaffer Transportation Company—Extension, Granite, opposing the relief sought by plaintiff, A. W. Schaffer, d/b/a Schaffer Transportation Company (hereinafter referred to as Schaffer), in the application described in paragraph III of the complaint. Each intervener is engaged in the transportation of freight for hire as an originating, intermediate or terminating carrier throughout the areas sought to be served by Schaffer, and each has a substantial interest in the question before the Commission by reason thereof.

2.

[fol. 44] 3.

Answering the first section of paragraph II of the complaint, interveners admit the same, except that interveners deny that plaintiff Schaffer is sustaining continuing and irreparable injury as a result of the Reports and Orders of the Commission.

Answering the second section of said paragraph II, interveners admit the same, except that interveners deny that the Reports and Orders of the Commission described in paragraph III of the complaint adversely affect the interest of the members of defendant, American Trucking Associations, Inc.

4.

Answering paragraph III of the complaint, interveners admit the same, except that interveners refer to and make a part hereof by reference the Report of the Commission, Division 5, dated May 24, 1954, and the Report and Order of the Commission, dated February 7, 1955 (Appendices A and B to the complaint) for a complete and accurate statement of the Commission's findings and conclusions, and to the entire record of the involved proceeding (No. MC-93529, (Sub-No. 2) before the Commission for the basis of the denial of the Commission of the aforesaid application.

5.

Answering paragraph IV of the complaint, interveners deny the same, and specifically deny that the Commission exceeded its powers and authority delegated to it under law in its determination of the involved proceeding.

6.

Further answering the allegations of the complaint, interveners aver that the Orders of the Commission complained of therein are valid and lawful in all respects, and that said Orders, together with the said Report of February 7, 1955, are fully supported and justified by substantial evidence of record in the involved proceeding; that [fol. 45] said Orders and Report were lawfully entered in the involved proceeding after the Commission had given due and careful consideration to every fact, circumstance

and condition brought to the attention of the Commission by the parties to said proceeding; that said Orders and Report are not illegal, unreasonable, arbitrary, capricious or discriminatory; and that said Orders and Report do not constitute an abuse of discretion by the Commission. Except as expressly admitted herein, interveners deny each and every allegation contained in the complaint.

WHEREFORE, interveners pray that this action be dismissed.

H. F. Chapman, Security Bank Building, Sioux Falls, South Dakota, Attorney for Interveners.

Of Counsel:

Carl Helmetag, Jr., Suburban Station Building, Philadelphia, Pennsylvania

James G. Lane, 226 South Station, Boston, Massachusetts

R. W. Cronon, 175 East Fourth Street, St. Paul, Minnesota

James R. Scoggin, 888 Union Station Building, Chicago, Illinois

Joseph H. Hays, 280 Union Station Building, Chicago, Illinois

Amos M. Mathews, 280 Union Station Building, Chicago, Illinois

Robert J. Bernard, 280 Union Station Building, Chicago, Illinois

James W. Nisbet, 280 Union Station Building, Chicago, Illinois

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[fol. 46] APPENDIX A TO ANSWER

Akron, Canton & Youngstown Railroad Company, The
Ann Arbor Railroad Company, The
Atchison, Topeka and Sante Fe Railway Company, The
Baltimore & Ohio Railroad Company, The
Boston and Maine Railroad
Central Railroad Company of New Jersey, The
Central Vermont Railway, The
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company

Chicago Great Western Railway
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Delaware and Hudson Railroad Corporation, The
Delaware, Lackawanna and Western Railroad Company, The
Denver and Rio Grande Western Railroad Company, The
Detroit and Toledo Shore Line Railroad Company, The
Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railroad Company, The (P. L. Solether, Trustee)
Elgin, Joliet and Eastern Railway Company
Erie Railroad
Fort Dodge, Des Moines & Southern Railway Company
Great Northern Railway Company
Green Bay and Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Kansas City Southern Railway Company, The
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company.
Midland Valley Railroad Company
Minneapolis & St. Louis Railway Company, The
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)
[fol. 47] New York Central System
New York, Chicago and St. Louis Railroad Company, The
New York, New Haven and Hartford Railroad Company, The
New York, Ontario and Western Railway Company
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway
Northern Pacific Railway Company
Pennsylvania Railroad Company, The
Pittsburgh & West Virginia Railway Company

Reading Railway System
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Southern Pacific Company
Texas and Pacific Railway Company, The
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Wabash Railroad Company
Western Maryland Railway
Western Pacific Railroad Company, The

[fol. 48] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 50] SECRETARY'S CERTIFICATE TO TRANSCRIPT (omitted in printing)

[fol. 52] **PLAINTIFFS' EXHIBIT NO. 1**

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-93529 (Sub. 2)

In the Matter of

A. W. SCHAFFER, d.b.a. SCHAFFER TRANSPORTATION COMPANY, Revillo, South Dakota.

Stenographic Notes

U. S. Court Rooms, St. Paul, Minnesota, Friday, June 13, 1952.

Met, pursuant to notice, at 9:30 a. m.

BEFORE:

RICHARD H. ROBERTS, Examiner.

APPEARANCES:

Donald A. Morken and J. L. Hetland, 100 First Soo Line Building, Minneapolis 2, Minnesota, appearing for applicant.

R. W. Cronon, 175 East Fourth Street, St. Paul, Minnesota, appearing for Class I Carriers in Western Trunk Line Territory, New England Territory Railroads, and Texas Railroad Association, intervenors in opposition.

Frank M. Coyne, 20 North Carroll Street, Madison, Wisconsin, appearing for William Dingman, d. b. a. Granite City Transfer, St. Cloud, Minnesota, intervenor in opposition.

[fol. 55] PROCEEDINGS

Exam. Roberts: Come to order, please.

There will be no smoking in the hearing room at any time.

The Interstate Commerce Commission has set for hearing at this time and place before Examiner Richard Roberts No. MC-93529, Sub No. 2, A. W. Schaffer of Reveillo, South Dakota, doing business as Schaffer Transfer Company, filed May 28, 1951, for authority to operate as a common carrier by motor vehicle (1) granite, manufactured and rough, from points and places in Grant County, South Daiota, to points and places in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, District of Columbia, Texas, Arkansas, Louisiana, Wyoming and North Dakota, traversing Virginia, New Jersey, Rhode Island and New Hampshire for operating convenience only; (2) granite, manufactured and rough, and building stone, from all points and places in Vermont to points and places in South Dakota, Minnesota, North Daiota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas and Louisiana, traversing New York, Pennsylvania, Ohio, Indiana and New Jersey for operating convenience only; and (3) steel saw blades, from Pittsburgh, Pennsylvania and points and places within twenty-five miles thereof, to points and places in Grant County, South Dakota; from Harrisburg, Pennsylvania, and points and places within twenty-five miles thereof, to points and places in Grant County, South Dakota; from [fol. 56] Chicago and Chicago Commercial Zone, as defined in 1 M.C.C. 673, to points and places in Grant County, South Dakota; traversing Ohio, Indiana, Illinois, Iowa, Minnesota and Wisconsin for operating convenience only.

In announcing your appearances, kindly state your name

and address, whom you represent, and whether or not you have been admitted to practice before the I. C. C.

Who appears for the applicant?

Mr. Morken: Donald A. Morkin and J. L. Hetland who is also in the room. We are both attorneys and we are both admitted to practice before the Commission. Our address is 1100 First National Soo Line Building.

Exam. Roberts: Are there any appearances for intervenors in support of the application?

Who appears for the protestants; I mean those who filed written protest prior to this. Who appears for the intervenors in opposition?

Mr. Coyne: Frank M. Coyne, 20 North Carroll Street, Madison, Wisconsin, appearing in opposition for intervenor, William Dingman, doing business as Granite City Transfer of St. Cloud, Minnesota. I am an attorney and registered practitioneer.

Mr. Cronon: R. W. Cronon, 175 East Fourth Street, St. Paul, Minnesota, appearing for the following intervenors in opposition, Class I Railroads in Western Trunk Line Territory, New England Territory Railroads, and Texas Railroad Association.

[fol. 57] Exam. Roberts: Any further appearances at this time?

The hearing, then, will begin.

COLLOQUY BETWEEN EXAMINER AND COUNSEL

Mr. Cronon: Mr. Examiner, may I make a short statement into the record at this time?

Mr. Morken: I have an amendment to the application, if it makes any difference in your judgment.

Exam. Roberts: Let's hear the applicant's amendment.

Mr. Morken: Mr. Examiner, the applicant moves at this time to amend the application, which amendment we think will limit and not expand it, and that is to eliminate all requests for authority to haul steel saw blades. The applicant requests authority to haul steel saw blades from three areas in East Pittsburg, Harrisburg and the Chicago Commercial Zone, and we move at this time to amend to strike all that request from the application.

Exam. Roberts: Are there any objections to the proposed amendment?

Mr. Cronon: Not I.

Exam. Roberts: In view of the fact that there are no objections and that is restrictive in nature, the amendment will be granted.

Mr. Cronon, you had a statement.

Mr. Cronon: I would like the record to show that on May 13, 1952, Mr. James G. Lane, manager of the Motor Carrier Bureau of the New England Territory Railroads, 226 South [fol. 58] Station, Boston, Massachusetts, wrote Mr. Paul Kyle, Chief, Section of Complaints, I.C.C., at Washington, requesting that there be a continued hearing in this matter at Montpellier, Vermont, and a later date to be set at the Commission's convenience.

Exam. Roberts: What did Mr. Kyle say?

Mr. Cronon: There has been no answer as yet on that.

Mr. Morken: If I may be heard on that, Mr. Examiner, after receiving a copy of Mr. Lane's letter to which Mr. Cronon just referred, on behalf of the applicant I wrote the Commission, with a copy, and objected to a continued hearing in any place, and made the offer to negotiate with Mr. Lane to take the testimony of his witnesses either in a stipulation or a deposition basis. I had no reply to that letter, and early this week I received a copy of a telegramed signed by W. J. Blanning, dated June [illegible], addressed to four individuals, Mr. Lane, a Mr. Manchester of the Central Vermont Railway, a Mr. Harry Morrow of the Berry and Chelseas Railroad, and a Mr. Clifford of the Ruthland Railway Corporation of Ruthland, Vermont, which reads, "Re tel, request for continued hearing, Montpellier, Vermont, MC-93259, Sub 2, Schaffer, denied."

Exam. Roberts: In view of the telegram written in the record by Mr. Morken and in the absence of anything to the contrary from Washington, the request for a continued hearing at this time will be denied.

Mr. Morken.

[fol. 59] Mr. Morken: I am ready.

Mr. Schaffer.

AUBREY WILLARD SCHAFFER was sworn and testified as follows:

Direct Examination.

By Mr. Morken:

Q. Will you state your name?
A. Aubrey Willard Schaffer.
Q. Are you the applicant in this proceeding?
A. Yes.
Q. Where do you live, Mr. Schaffer?
A. Revillo, South Dakota.
Q. And for the purpose of this application only are you engaged in the motor carrier business?
A. Yes.
Q. Do you have other businesses?
A. Yes.
Q. But there are no other motor carrier operations?
A. No.

Exam. Roberts: What are they, please, sir?

By Mr. Morken:

Q. Will you tell us what your various business interests are?
A. We have a garage where we do our maintenance. We run that separate from the motor carrier business.
Q. Where is the garage?
A. That is located at Alby, South Dakota.
[fol. 60] Q. Does that garage also serve the public generally?
A. Yes, to a small extent, mostly our own service, but it is open. We have one man that does nothing but outside work.
Q. All right. Other businesses?
A. Then we are engaged in the farming business. I own the equiment and the farm, but it is leased out from time to time on a three-year basis, and I have no connection with it outside of an income from it. I have no connections other than just the income from the farm. We have a full time man that takes care of everything on this farm.

Q. Are you connected with a salt sales business?

A. Yes. We are a wholesale distributor for the Carey Salt Company, that is, what I mean by that, we are a wholesale distributor handling the Carey products, I should say. We have our own equipment we use for distributing, and also a wholesale feed bus ness in connection with this salt business covering the northeastern part of South Dakota.

Q. Do you also run a regular route, general commodity freight line?

A. Yes, between Milwaukee and Revillo, South Dakota, the Twin Cities here, that is, Minneapolis and St. Paul, making regular trips weekly.

Q. And then you also have an irregular common carrier operation?

A. Yes.

Q. That is for the hauling of granite from Grand County, [fol. 61] South Dakota, to various states?

A. That is right.

Mr. Morken: We have some exhibits on that authority.

Exam. Roberts: They will be identified as Applicant's Exhibits Nos. 1, 2, and 3 for identification.

(Applicant's Exhibits Nos. 1, 2 and 3, Witness Schaffer, were marked for identification.)

By Mr. Morken:

Q. Now, Mr. Schaffer, referring to what has been marked as Exhibit 1, and you bear with me and I might speed this up a bit, this exhibit bearing the heading after the title of the Application Docket MC-93529, Sub 2, is a copy of your present irregular route authority authorizing the hauling of granite and is your original certificate here from which the actual described authority was taken?

A. Yes.

Q. Now, if you will refer to what has been marked Exhibit 2, and after the title of this proceeding——

Exam. Roberts: Off the record.

(Discussion off the record.)

Exam. Roberts: On the record,

Mr. Morken: Exhibit No. is the applicant's present outstanding authority embraced in Docket MC-93529, Sub 2.

Exhibit No. 2 is his present outstanding authority embraced in the original Docket MC-93529.

By Mr. Morken:

Q. Now, if you will refer to what has been marked as [fol. 62] Exhibit 3 and that is an order of the Commission dated June 22, 1951, which merely changes your trade name on doing business from A. W. Schaffer to A. W. Schaffer as Schaffer Transportation Company?

A. That is right.

Q. And this is all of the outstanding authority and voers all of your ICC regulated operations at the present time?

A. That is right.

Mr. Morken: I will offer Exhibits 1, 2, and 3.

Exam. Roberts: Any objection, gentlemen?

(No response.)

Exam. Roberts: Hearing none, they will be received in evidence.

(Applicant's Exhibits Nos. 1, 2 and 3, Witness Schaffer, were received in evidence.)

Exam. Roberts: This will be identified as Applicant's Exhibit No. 4.

(Applicant's Exhibit No. 4, Witness Schaffer, was marked for identification.)

By Mr. Morken:

Q. Referring to what has been marked as Exhibit 4, that is a black and white outlined map of the United States, and specifically calling atttention to the State of South Dakota and the little black mark that purports to be Grant County, which is the origin point of your existing authority, is that correct?

[fol. 63] A. That is correct.

Q. And the balance of the states that have horizontal lines are the states which are your destination states to which you now have authority, that is, from Grant County to all of the states with horizontal lines?

A. That is correct.

Q. And the states with vertical lines that are surrounded in red lines to make them stand out are the seven or eight additional states that are being requested in this application?

A. That is right.

Q. Grant County to those states is an extension of your existing service?

A. Yes.

Mr. Morken: With that explanation, I offer Exhibit 4 only to possibly clarify the scope of the application.

Exam. Roberts: Any objection to the receipt of Exhibit 4?

Mr. Coyne: No objection.

Mr. Cronon: None.

Exam. Roberts: It will be received in evidence.

(Applicant's Exhibit No. 4, Witness Schaffer, was received in evidence.)

Exam. Roberts: This will be identified as Applicant's Exhibit No. 5.

(Applicant's Exhibit No. 5, Witness Schaffer, was marked for identification.)

[fol. 64] By Mr. Morken:

Q. Mr. Schaffer, referring to what has been marked as Exhibit 5, that is also a black and white outlined map of the United States with slanting lines through Vermont and then a large numer of states in the middle United States and this exhibit is to purport your requested authority from Vermont to the, I believe it is, seventeen states in the middlewest?

A. That is correct.

Mr. Morken: I will offer Exhibit 5.

Mr. Coune: No objection.

Mr. Cronon: No objection.

Exam. Roberts: It will be received in evidence.

(Applicant's Exhibit No. 5, Witness Schaffer, was received in evidence.)

Exam. Roberts: It will be identified as Applicant's Exhibit No. 6.

(Applicant's Exhibit No. 6, Witness Schaffer, was marked for identification.)

By Mr. Morken:

Q. Will you identify what has been marked as Exhibit 6?
A. That is a equipment sheet as of the first of January, 1952.
Q. That list is all of the equipment that you operate in your so-called Granite hauling business, is that correct?
A. Yes.
Q. You own other equipment but it is not included in this series?
[fol. 65] A. Yes.

Mr. Morken: I will offer Exhibit 6.
Mr. Cronon: No objection.
Mr. Coyne: No objection.
Exam. Roberts: It will be received in evidence.

(Applicant's Exhibit No. 6, Witness Schaffer, was received in evidence.)

Exam. Roberts: This will be identified as Applicant's Exhibit No. 7.

(Applicant's Exhibit No. 7, Witness Schaffer, was marked for identification.)

By Mr. Morken:

Q. Mr. Schaffer, referring to what has been marked as Exhibit 7, and before I ask you some specific questions on it, this purports to be some various financial statements and profit and loss statements, and you have the original as prepared by your public accountant in Milbank, South Dakota?
A. Yes.

Q. And what has been marked as Exhibit 7 is a copy of that original?

A. That is right.

Q. Now, will you continue there and take it page by page and tell us what Exhibit 7 is, the first page?

A. The first page shows the balance sheet of the entire, I believe it is the entire, operation of all operations here combined. Page No. 2 shows——

[fol. 66] Q. Now, isn't that the operating statement for all of your operations?

A. Yes. Page No. 2, I think, is all of the operations combined, I should say, and page No. 1 is more or less a balance sheet, see.

Q. For all of the operations?

A. Page No. 2 is all operations, total year's operations, 1951.

Q. No. 3?

A. Page 3 shows our farming operation, the income off of the farm operation, for 1951. No. 4 is the Granite trucking operation, and No. 5 is our grain and salt operation. It is feed and salt, it should possibly be, but grain explains it.

Q. A question on that; do you haul salt, grain and feed as a private carrier; that is, hauling your own merchandise?

A. Hauling my own merchandise.

Q. And in that operation do you use trucks that you do not use in your Granite operation?

A. Yes.

Q. All right, and the last page?

A. The last page shows our, what we call our, freight truck from Milbank, Revillo to the Twin Cities and back.

Q. That is your regular route, general commodities?

A. Regular route, general commodity operation.

Q. Now, Mr. Schaffer, I know that in typing this apparently the young lady in our office did not add one more [fol. 67] page, which was an operating statement covering the garage business.

Mr. Morken: If I might read into the record on this, it shows a total—I can submit copies as a ratified exhibit.

Exam. Roberts: Off the record.

(Discussion off the record.)

Exam. Roberts: On the record.

Mr. Morken: Mr. Examiner, we failed to have typed up the operating statement for 1951 covering the applicant's garage business. I have a copy of it here in front of me, and in round figures it shows a net loss of four thousand dollars.

If there is no objection, I could submit a copy of that as a ratified exhibit, and until then tie it in with the other operating statements that are now included in Exhibit 7.

Mr. Cronon: Did you say it showed a net profit or net loss?

Mr. Morken: Net loss.

Exam. Roberts: You will be permitted ten days in which to file a ratified exhibit showing the garage operation, and it will be due on or before June 23, 1952, and serve copies to all parties of record.

By Mr. Morken:

Q. Mr. Schaffer, again referring to Exhibit 7, it is dated December 31, 1951, covering that year, the year 1951, do you have available a later summary or exhibit of your financial condition?

A. No, we don't, because we have our auditor in every three months, but he makes a report only every six months, [fol. 68] and that report, of course, will be made the first of July. Therefore, it doesn't give us time. We don't have him make up a report but only every six months.

Q. You are not a Class I carrier?

A. No.

Q. The information that is contained in Exhibit 7, was that prepared from your company's books and records at your direction?

A. Yes.

Q. And to the best of your knowledge is it true and correct?

A. That is right.

Mr. Morken: I will offer Exhibit 7.

Exam. Roberts: Will you care to see that? I will defer ruling until after cross-examination.

Mr. Coyne: I wish we could.

By Mr. Morken:

Q. One more question, Mr. Schaffer, taking the balance sheet, that is, the first page, and let's take the first two or three items, the cash on hand, that is the current cash from all of your various enterprises?

A. On what page?

Q. The first page of Exhibit 7.

A. Yes.

Q. Take the trucking equipment and cars, that covers the trucks in your dry freight and your granite operation and your salt and grain operation?

[fol. 69] A. That is correct.

Q. Are you able to make a breakdown at this time to divide the amount of trucks that are dedicated to any one particular operation, value-wise?

Q. No, I wouldn't be in a position to do that.

Q. Do you have any plan of continuing business either in the same manner or different manner, if tis proposed authority is granted?

A. We intend to incorporate the trucking of granite and dry freight into one business, incorporate it with my father. He intends to put in about fifty thousand dollars into the business and figures on incorporating, just the trucking end of it such as granite and the dry freight.

Q. At the present time you operate the trucking end of it alone?

A. That is correct.

By Exam. Roberts:

Q. What percentage of your time is devoted to the motor carrier operations as compared wo the private enterprises?

A. About ninety percent.

By Mr. Morken:

Q. Now, other than what we have covered, do you have any other interest in any motor carrier operations, either contract or common?

A. No, I haven't.

Q. According to Exhibit 6 you are operating about nine, I believe it is, tractor-trailer units and an extra tractor in [fol. 70] the granite hauling business at the present time?

A. That is right.

Exam. Roberts: How many vehicles do you have all together in your motor carrier operations, broken down into tractor and trailer units?

The Witness: There is approximately fourteen, I think it is fourteen, complete units and one spare tractor.

Exam. Roberts: That is your total number of vehicles in the motor carrier operations?

The Witness: Yes.

Exam. Roberts: Are any of these vehicles used in your private carrier enterprise?

The Witness: Four of those.

Exam. Roberts: This will be identified as Applicant's Exhibit No. 8.

(Applicant's Exhibit No. 8, Witness Schaffer, was marked for identification.)

By Mr. Morken:

Q. Mr. Schaffer, referring to what has been marked as Exhibit 8, will you tell us what that is?

A. This is a copy taken from our records of three of the granite trucks hauling granite for the year of 1951, showing the dates, the destination, and the number of stops per load.

Q. Now, do you have the company record here with you that this exhibit was made up from?

A. Yes.

[fol. 71] Q. Why did you take only three trucks?

A. Well, it is quite a lengthy deal. We have three more that we had ready to register because of the fact that it would make a long extensive thing, and this covers about, or shows a picture of the operation, and, in other words, it shows about fifty percent of our haulings.

Q. On the fifty percent, this exhibit shows approximately fifty some haulings?

A. Yes.

Q. How many did you have total in all your trucks last year?

A. We had one hundred fifty-seven loads last year.

Q. From Grant County?

A. From Grant County, South Dakota, to the states.

Q. Now, is it not a fact that the way you keep your records in a book you keep the records of three trucks in one book?

A. That is right.

Q. And this is a copy of the haulings taken from that book?

A. From the one boo, yes.

Q. Now, will you take the book that this exhibit was made up from, and can you find the haul that s oss February 16, 1951, as to how the work was done, where you made one stop, let's——

Mr. Coyne: May it please the examiner, I don't know how material all of this is, and if we are going to spend any considerable time on it, I object to it on the grounds that it is immaterial on what he has hauled in the past.

[fol. 72] Exam. Roberts: I was just going to ask what the materiality of this exhibit is.

Mr. Morken: Only to show that we are operating all daily, at least weekly, and maybe several times weekly in most of these states, particularly eastern states.

Exam. Roberts: These are operations that are now performed under your existing authority?

Mr. Morken: That is right.

Exam. Roberts: And this shows the frequency of service?

The Witness: That is right.

Exam. Roberts: Doesn't the exhibit speak for itself?

Mr. Morken: I was only going to explain the—I will offer the exhibit.

Mr. Coyne: I have no objection, but I do want to ask some questions on it.

Exam. Roberts: We will withhold the ruling on it.

By Mr. Morken:

Q. Mr. Schaffer, about how frequently do you at the present time get trucks down in, let's say, New York or Pennsylvania?

A. At the present time it averages——

Mr. Coyne: We object to that as being immaterial.

Exam. Roberts: Let's hear what he has to say.

Mr. Coyne: May it please the examiner, there is no application pending here today to perform any transfer to Pennsylvania or New York, and neither is there any application to perform transfer from——

[fol. 73] Exam. Roberts: The application does cover the New England States and certain surrounding states.

Objection is overruled.

A. At the present time we have an average of about one load a week.

By Mr. Morken:

Q. Do you load those trucks coming back from the eastern points at the present time?

A. At the present time the only way we load them is lease them to a licensed motor carrier that has a certificate covering the authority for whatever he may give us to haul.

Q. In your present operation are you operating empty trucks back from eastern destinations or from southern destinations?

A. Quite frequently, yes.

Q. Now, if this authority is granted and you are authorized to haul from Vermont to the states that you requested, to the middle part of the United States, do you have any plans as far as the amount of equipment that you would dedicate to the service and how it would be run?

A. Yes, we intend, if this application is granted, to station a dispatcher at Vermont.

Q. That will be a company employee?

A. That will be a full time company employee, and he will have three new pieces of equipment stationed there that will be under his jurisdiction at all times, and it will work as a shuttle system.

[fol. 74] Exam. Roberts: What point in Vermont?

The Witness: He would be either at Monpellier or Berre. I presume it would be at Berre.

By Mr. Morken:

Q. You mentioned a shuttle system?

A. Well, when we were in the east we would pick up the Berre granite coming back to the midwest area, and then the same truck would take a load of South Dakota granite back into the east, and providing that if the business warranted more trucks from one place to another, why, then we would have to use a sytem similar to what we use now.

Q. On your present hauling do you get notice from the shipper ahead of time as to what hauls you are going to get and where they are going?

A. Yes, at the present time, in the past three years, two or three years, that we have been hauling in granite we usually know a week in advance, sometimes two weeks in advance.

Q. With that week's notice would it be possible to establish this shuttle service that you talked about as far as either consigning empty trucks on into Vermont or if there is no load in Vermont to bring them back from some haul that you are presently taking?

A. Yes, with a one-week notice it would give us ample time to keep them constantly loaded.

Q. On your present operation with regard to the speed [fol. 75] of delivery will you give us an example of how long it takes you to operate a truck ffoj some point in Grant County, South Dakota, to some eastern destination?

A. Well, on Illinois, Indiana, and Western Ohio we figure third-day delivery.

Q. Then, would that truck leave, let's start with Monday, if the truck left your home Monday where would it go?

A. Well, our route is that we have our driver leave South Dakota when he comes to work he has had his instruction to drive to possibly Moston, Wisconsin, unless he gets tired before that and he is instructed to sleep. We make it a point to stop in Moston, and then the next day he is to remain there until he gets his eight or ten hours' sleep, and he goes on from there until he gets to the south side of Chicago, and then——

Q. On that point, do you have a setup available at the present time there for your drivers?

A. We have at Moston, and we have at Dyer, Indiana, that is outside of Chicago, and then he proceeds, if he has a load for Indiana or Ohio, he proceeds to deliver, and he is to work his ten hours, and then tie up wherever he may be.

Q. That would be the third day?

A. That would be the third day.

Q. And if the load was going to New York or Pennsylvania or this proposed service into the east, how much longer?

A. It takes approximately two days more to go to up-[fol. 76] state New York. That driver being away from home is schooled before he is hired, instructed never to exceed the I.C.C. rules on driving, and it is one item that we have enforced very, very strictly. We have lost a few good men on it. We try to make it hold, because the truck is away a good deal of the time. After he leaves Chicago, then he is instructed to drive only his length of time that he is allowed to drive, and then secure a hotel room.

Q. You can cover New York on the fifth day, then?

A. Yes.

Q. And would that include Connecticut or Massachusetts or would that take additional time?

A. Yes, because it is a little bit further.

Exam. Roberts: One extra day?

The Witness: Approximately.

By Mr. Morken:

Q. Would it be the sixth morning.

A. About the sixth morning, depending on the road conditions, but it would take approximately six days.

Q. Last year on your one hundred and fifty loads, and I don't know if you can give me this answer, but do you know the approximate tonnage that you transported?

A. No, I couldn't bive it to you offhand.

Q. Do you know how many claims your company has had for damage or breakage?

A. We have had two claims in 1951, and the total amount [fol. 77] was about one hundred and forty-one dollars.

Exam. Roberts: Before we get off of this time in transit,

what would be your estimated time to points such as Maryland and West Virginia and District of Columbia?

The Witness: Well, that would approximately be five to eight days.

Exam. Roberts: That would be about the same time as upstate New York?

The Witness: About the same time as upstate New York.

Exam. Roberts: How about Oklahoma and Texas points?

The Witness: Well, our Texas operations being a large state, it would depend a lot on the—the northern part would be approximately a day earlier than the extreme southern part.

By Mr. Morken:

Q. How many days to the northern part from Grant County?

A. Approximately four days.

Q. And on that, if you are granted this authority, would the time it takes for your delivery from points in Vermont back to the middlewest be approximately the same?

A. It would be approximately the same from the time we was loaded, yes.

Q. That is, then, Illinois, the most eastern edge; you would be in there the fourth day?

A. That is right.

Q. And as you go further west to Montana or to Texas [fol. 78] it would be the fifth to sixth day?

A. Well, if you went out to Montana or Texas it would probably run into the seven days as it is somewhat further than what the destination east would be.

Exam. Roberts: You are not authorized to serve Montana, are you?

The Witness: Serving out of Grant County.

Exam. Roberts: You are speaking of the return movement?

The Witness: Yes.

By Mr. Morken:

Q. You mentioned your one hundred and forty some dollars in claims last year. Is granite susceptible to damage or breakage?

A. Yes.

Q. And is that something peculiar that makes it susceptible to damage?

A. Yes, our experience with granite is it chips very easily and the more you handle it the more times that you are liable to chip it. They carry what they call a line on the edg that chips very easily in moving it from one spot to another; it is damaged very easily. It is very easily damaged by certain chemicals or items such as grease, and oil is very damagable to granite, and we have overcome our breakge by specific loading.

Q. Will you describe your loading?

A. When we load a load of granite usually we have an [fol. 79] experienced driver that is familiar with it or experienced man goes in from the plant. Our dispatcher loads it. He is familiar with it, being connected with me as long as I have been in the business, and he so arranges this granite on this load so that if he has a one-stop load, it is very simple, I would say it is simple, to load, but on a two, three, four or five-stop load it is fairly hard to load, because you have to place the granite so it doesn't shift on the truck after you have taken off some pieces.

Q. Is it possible to load it so that all of your first stop will come off the back of the truck?

A. No, we don't load it that way. We load it so that it comes off the middle of the truck, that is the way we load it, that the weight distribution is equal upon the axles of the tractor trailer unit.

Exam. Roberts: Are these trailers underslung?

The Witness: No.

Exam. Roberts: Do you use cranes for loading?

The Witness: Yes, skids and hoists for unloading.

By Mr. Morken:

Q. In addition to your skids for unloading, do you have additional precautions to protect it from damage?

A. On the highly damageable stuff, yes, we have three foam rubber pads that we usually place in the bottom of the skids on particular stuff that is highly damageable.

Q. So that when the granite slides down the sides it doesn't hit it?

[fol. 80] A. In the event it gets away from the driver, that if it did hit the ground, it wouldn't be dragged. We, of course, don't use that or all the operation, but the biggest percent of it, and we also have a hoist that is equipped to fit on four of the different trailers and be transferred from one traler to the other, depending on the load, if i is a special piece that we know we have to unload ourselves or the driver has to unload, we send this hoist, and it operates with hydraulics, and a driver can pick up approximately a ten thousand pound piece and swing it off himself. Very seldom that you have those shipments, but you do have them, and in the past they have been quite frequent, because it is very seldom it is either out on the one truck or the other, and with our present operation we are getting some, but we would have to put on additional equipment for that to handle any more.

Q. What is the size of these loads that are offered to you?

A. Well, they vary with the manufacturer.

Q. What is your minimum in your tariff?

A. Twenty-four thousand.

Q. What is the maximum you carry?

A. Thirty-three.

Q. Do your loads run between those weights.

A. Yes.

Q. Now, are they predominately one-load one-customer [fol. 81] shipments that you are presently hauling or are they so-called split delivery shipments?

A. The biggest percentage are split delivery shipments.

Q. What percentage of the granite that you haul presently is classified as rough and how much is finished?

Q. I would say eighty per cent is finished granite, approximately ten is semi-finished, and ten per cent rough.

Q. And the granite that you haul, do you know the use of it or the purpose that it is ultimately going to be used for?

A. Yes, it is usually used for monuments or building stone.

Exam. Roberts: Is there any different between the type of granite you haul eastbound and that westbound?

The Witness: Is there any difference?

Exam. Roberts: Is there any recognizable feature?

The Witness: It is the same, practically the same, kind of granite, outside of the South Dakota is called red granite and the eastern granite that we propose in this authority is what they call a gray granite. It is a difference in color, but as far as the rock is concerned, it is practically the same.

Exam. Roberts: What about the building stone that you propose to transport?

The Witness: It would be the same kind out of there as it would out of South Dakota.

Exam. Roberts: I don't see any building stone in South Dakota on your application. Would that be classified as granite?

[fol. 82] The Witness: Yes.

Mr. Morken: Mr. Examiner, I do not know why the application says granite, smooth and rough, and building stone. I believe, as the witness just said, it is all granite, and that is all that we are seeking to haul.

Exam. Roberts: I want the record to be clear on that. Continue.

By Mr. Morken:

Q. Who do the monuments that you haul go to?

A. Usually all goes to monument dealers.

Q. What type of monument dealers?

A. Well, out in South Dakota operation we have hauled to both small and large, the biggest percent is to small operators.

Q. Where are they usually located?

A. Well, they are located all over. You never know where you might find a monument dealer. He may be located downtown; he may be located near a cemetery or the edge of town. We find that the biggest percent of our new monument accounts are the fellows that are rebuilding their places. They are putting them out on the edge of town, our near a cemetery. We find that that has been quite commonly practiced.

Q. As far as asking for state-wide authority here in your destination territory, would it be possible to limit this authority that you request to, say, particular cities

or towns rather than state-wide, would that be practical in your operation?

[fol. 83] A. No, it wouldn't be practical because of the fact that probably we would take a small town, you could just about name any small town, and one particular town is in Ohio that we deliver to, and the dealer has a shop downtown, located downtown, and he unloads monuments out in the county. He has a display lot out in the county, and he delivers them out of town.

Exam. Roberts: Could any of this granite that you propose to transport be used in the construction of buildings?

The Witness: Yes.

Exam. Roberts: Do you transport any of that type of granite at the present time?

The Witness: Yes.

By Mr. Morken:

Q. Do you kow from your past experience or can you give us any idea of the number of consignees that you serve who are on railroad sidings or on railroad tracks?

A. At the present time I only know of three.

Q. In all of your present fifteen or sixteen states, is that correct?

A. That is right.

Q. Your shipper, where you are now hauling from in Grant County, is he located on a rail siding?

A. No; seven miles.

Q. How far?

A. Seven miles from a railroad siding.

Q. And you have a witness from that company here?

[fol. 84] A. Yes.

By Mr. Cronon:

Q. Seven miles from where?

A. From Milbank, South Dakota.

Exam. Roberts: Is Milbank your point of origin?

The Witness: Yes.

Exam. Roberts: Is this granite to be picked up from quarries or from a particular warehouse?

The Witness: Well, there are three fabricating plants out at South Dakota, and there is one of them that has the quarries out in the country and has the finishing plant in town. The other particular one, they are serving at the present time has both the quarry and the finishing plant in the countr, it has the finishing plant right next to the quarry.

By Mr. Morken:

Q. And what would be the situation in points in Vermont?

A. Well, the situation in Vermont, I think, would be practically the same.

Mr. Morken: Mr. Examiner, we have a witness here from Vermont who will cover that.

I am just about through with Mr. Schaffer.

By Mr. Morken:

Q. But if this authority is granted will it affect your existing operations service-wise or profit-wise?

A. Both service-wise and profit-wise.

Q. Take service-wise, will it impair your existing service or improve it?

[fol. 85] A. Improve it.

Q. Why is that?

A. Because of the fact that we would have more equipment, there will be more trucks moving back and forth, and it would improve the service because it has always been a problem on our New York and Pennsylvania hauls to get a return load out of Pennsylvania or New York to make it a profitable operation, but yet the shipper demands and also seems as though the fellow who receives the granite demands truck shipment, and unless we supl it, they have been using some of their own equipment to supply that, and we have lost a considerable amount of business this last year because of the fact that we didn't supply some of the eastern states or couldn't supply some of the eastern states.

Q. Let me ask you this, profit-wise it would follow that

it would eliminate empty miles and therefore gain more revenue for the same number of miles operated?

A. That is right.

Q. Are there any other common carriers that you know of located in the Grant County area or with equipment stationed there to haul this granite?

A. There is no equipment stationed in Grant County at the present time, as there is other authority.

Q. Do you know of any motor carrier that is presently operating from the Berre area in Vermont back to these states that you request?

[fol. 86] A. No, I know of none.

Mr. Morken: That is all I have of Mr. Schaffer on direct. I would like to ask your cooperation to withhold cross. I have two witness, one from South Dakota and one from Vermont, and I promised them that I would like to get them out by noon. Mr. Schaffer, of course, will be here all day.

Exam. Roberts: Let's take a five-minute recess.

(Short recess.)

Exam. Roberts: On the record.

Mr. Morken: I will call Mr. Osborne.

JOSEPH E. OSBORNE was sworn and testified as follows:

Direct examination.

By Mr. Morken:

Q. Will you state your name?

A. Joseph E. Osborne.

Q. Where do you live, Mr. Osborne?

A. St. Paul.

Q. What is your business?

A. Osborne-Peterson, Inc.

Q. What is that company?

A. It is a retail monument establishment, and we manufacture and sell at retail.

Q. And for clarification here, will you describe what

the term "manufacture" involves in the monument business?

A. We fabricate and letter monuments and markers.

[fol. 87] Q. Inbound to your plant do you have both rough and finished granite?

A. We do.

Q. You are aware of this application and its scope and what is proposed?

A. Yes, I am.

Q. Well, the applicant has authority from Grant County to Minnesota, but do you have any interest in his proposed service from Vermont to Minnesota?

A. Yes, I do.

Q. And what is that interest?

A. We would like to be able to get our Vermont granite here more quickly and in better condition than is the case at present.

Q. How are you receiving it at the present time?

A. A very large share of it in railroad carload.

Q. I gather you are one of the larger dealers that can regularly take carload lots, is that correct?

A. We are one of the larger dealers in that area, not nationally.

Q. Will you continue to use a carload if this service is granted?

A. Yes, we will.

Q. As far as less than carload lots is concerned, what size shipments were you taking by the weight or packages or dimensions?

Q. Well, occasionally we want to get something in a hurry, and we don't want to order a carload, and there [fol. 88] isn't always a pool car coming into this area, and in those instances we would like to get something in a hurry of less than carload for a specific order.

Q. Do you understand that at present your less than carload shipments are generally held until there is enough total less than carload shipments in the east to make up a carload lot?

A. Not always, sometimes they are shipped at the discretion of the shipper who wants to get them out of his plant, and sometimes at our own direction.

Q. Have you received any less than carload shipments lately?

A. Yes, we have received one this year.

Q. Do you know when that was shipped and when you received it?

A. Yes, I do. I have the bill of lading on it. It was shipped, the bill of lading is dated April 28, and it was received in St. Paul on May 27.

Q. What was its size and weight and how many pieces were in that shipment?

A. A very small shipment, five crates.

Q. The total weight?

A. Twenty-five forty.

Q. Two thousand five hundred and forty pounds?

A. Right.

Q. What was the condition of that shipment when you received it?

A. Four of the crates were satisfactory in good condition. One was broken up. There was evidence that it had [fol. 89] been crated, but the pieces were lying there, and each of the five pieces of polished granite were damaged, of the five pieces in that freight, they were markers.

Q. Does this damage have any peculiar affect on your business as far as replacing that stone or——

A. In this instance it wasn't serious, because they were ordered markers. We were not able to use them for the purpose they were intended. We were not able to use them for the size they were intended. In other words, they would not have filled the orders for which they were intended.

Q. Would the availability of this five, six or possibly seven-day delivery by Mr. Schaffer be of a benefit to you in your business?

A. Greatly so.

Q. Are you able to give us any indication of about how frequently you would use it?

A. Well, I think that we would use it perhaps a half a dozen times a year. I wouldn't know exactly. The service has never been available, so I haven't given any particular thought to it.

Q. Are you aware of any other motor carrier service such as is proposed from the Vermont area to——

A. No, I am not.

Q. No other carrier has ever solicited you?

A. Never.

Q. Is there something peculiar why you want granite from Vermont?

[fol. 90] A. Yes. Our company has been in business since 1880, and we have used Berry granite since that time. Naturally we built up a business in that particular material. There is no other material close to it. Some people simply want Berry granite, period.

Q. The type of granite we have in Minnesota and South Dakota is not comparable?

A. It is an entirely different color type and suited to an entirely different type of monument in my opinion.

Exam. Roberts: Does this granite originate at Berry, Vermont?

The Witness: Yes, sir, it is quarried there and shipped from there.

Exam. Roberts: If the applicant was given authority he would pick it up at the town of Berry or at the quarry?

The Witness: I would assume that he would pick it up at Berry, as the quarries are at Barry.

Exam. Roberts: It would be at a fabricating plant?

The Witness: Not necessarily. We get some material in the rough from the quarry, and we get some complete fabricated. In other words, we get slabs, we get rough stock, and we get finished monuments, all three, and all three originate at Berry.

Exam. Roberts: Is there any particular rush about the rough material that you get?

The Witness: Sometimes. Like I know other business [fol. 91] people may postpone a decision, but once made, they want delivery very soon, that is, most people do.

Exam. Roberts: You have facilities at your place for finishing?

The Witness: Yes, sir.

By Mr. Morken:

Q. Are there certain peak seasons in your business?

A. There certainly are.

Q. Will you explain what they are?

A. Our business is extremely quiet in the selling end from November until April, and obviously in this area, due to weather conditions, from the first of December until May we make almost no deliveries and not too many sales percentage-wise. From April until Memorial Day we are really rushed in our place. We work seven days a week and ten hours a day. People want their marker for Memorial Day. The death may occur in October, and they will not make a decision until the first of May, and also possibly on Mother's Day, and they certainly want it for Memorial Day. Throughout the sumer we are moderately busy, and there is a rush again in the fall because of the frost and the fact that we cannot install monuments after the ground is frozen, and the foundations cannot be installed. Cemeteries put in the foundations and will not place them after the ground is frozen. It is a seasonable business, and that is particularly true in this area because of the short summer.

[fol. 92] Q. At the present time and with your present services do you have a cut-off date on orders that you can place for Berry granite prior to Memorial Day?

A. I don't understand your question.

Q. If you want a monument to place for Memorial Day do you have to allow for any specified period of time in order to get it?

A. We certainly do.

Q. How long is that?

A. Depends on the size of the monument and the conditions in Berry, whether they have a large number of orders on hand or not. I would say if the thing is even a moderately sized monument you would have to order it in March to assure Memorial Day delivery.

Q. Do you allow a period of time for transportation on that?

A. Yes.

How long?

A. Well, it varies awfully much. We had a carload that came through this year in seven days; and we have had carloads that come through in two and a half weeks. Less

than carloads, I think that we have never had anything through in less than three and a half to six weeks.

Q. Would the availability of this service help you in that particular?

A. It would be extremely helpful at that particular time. I think that would be the most important help the company [fol. 93] could give us would be in that month or two before Memorial Day.

Q. Would it be that you would be ordering additional orders that you are not now ordering because of this delay?

A. Yes, it would. We would be able to make delivery when otherwise we could not.

Q. And would the same thing be true on other rush days, such as Mother's Day?

A. Yes, it would, and in the fall, in October and November when we are trying to beat the winter deadline.

Q. Have you ever used Mr. Schaffer's service?

A. Yes, I am quite sure we have had shipments from South Dakota, and I am quite certain that we have used his service.

Q. I gather at least as far as you remember there were no complaints or nothing wrong with the service?

A. No.

Q. Do you remember that it was satisfactory?

A. I do remember that it was satisfactory.

Mr. Morken: You may examine.

Cross examination.

By Mr. Coyne:

Q. Mr. Osborne, you are interested primarily in nothing more than just transportation by truck of your commodity from Berry, Vermont, to your place of business in St. Paul, isn't that correct?

A. I am interested in the speed and safety of transportation. I don't care whether it comes by truck or rail.

[fol. 94] Q. Now, Mr. Osborne, if the Granite City Transfer Company of St. Cloud, Minnesota, would make available to you a service comparable to that described by the applicant whereby you could call them and say, "I have a

load of granite I would like to have you pick up at Berry, Vermont" and have them deliver it to you in five or possibly six days, would that service satisfy you?

A. I would think so.

Mr. Morken: May I interrupt for a moment?

The Witness: I have never used that particular service, of course.

Mr. Morken: Mr. Examiner, if Mr. Coyle could ask this question, I am not aware of Mr. Dingman's authority from Vermont to this area, and, first, does he have such authority?

Mr. Coyne: Hes, he has such authority.

Mr. Morken: From Vermont to what states?

Mr. Coyne: I intend to develop it later.

Exam. Roberts: Off the record.

(Discussion off the record.)

Exam. Roberts: On the record.

A. I wasn't aware that that was available, sir.

By Mr. Coyne:

Q. Getting back to my question, if it should develop in this hearing that the Granite City Transfer Company has been performing the transportation of granite by motor truck with drivers who are familiar and trained in the [fol. 95] handling of granite for some ten to eleven years and that that company is authorized and is willing at your call to transport your granite, either truck load or split shipment, from Berry, Vermont, to your place of business in St. Paul in five to six days' time limit, would that service satisfy your demands?

A. I believe it would.

Q. Are you willing to use that service at the present time?

A. I am willing to use any such service that would expedite the shipments that I have referred to that are now late.

Mr. Coyne: That is all.

Cross examination.

By Mr. Cronon:

Q. Mr. Osborne, may I see that bill of lading to which you referred?

A. Yes, sir.

Q. That bill doesn't show the date that the shipment actually left Berry, does it? That is the date that the consignor made out the bill of lading, isn't it?

A. I think so.

Well, now, you spoke about the winter season being quiet. Do you ever put in a stock of Berry granite during the winter?

A. Yes, sir, we always have a large stock of Berry granite.

Q. Do you propose to transport all of your granite by truck if this application is granted?

A. Certainly not.

Mr. Cronon: That is all I have.

[fol. 96] Exam. Roberts: Redirect examination.

Redirect Examination.

By Mr. Morken:

Q. Following up on Mr. Coyne's cross-examination with regard to Granite City Transfer, prior to today have you had any business dealings with Granite City Transfer?

Mr. Coyne: I object to that as immaterial. The sole question is whether or not there is a need for applicant's service.

Exam. Roberts: Objection overruled.

The Witness may answer.

A. I think we have. I know that most of our granite from the St. Cloud area comes by a different carrier, Raymond Brothers, but I do think that through the years I have seen that truck in our yard.

Q. Prior to today have you ever been solicited or contacted by Granite City Transfer with regard to your business?

A. Never. I did not know until today that there was any motor service available from Vermont to St. Paul, although in our meetings we talked about it, and I wrote to the shippers and asked them if there isn't some way to get the stuff here more quickly.

Q. Whom did you write to?

A. The shippers.

Q. In Vermont?

A. In Vermont.

Q. If you know, assuming that the Granite City Transfer [fol. 97] will have this service that Mr. Coune outlined, does that mean that you will not need or will not use the service of the Schaffer Company as proposed?

Mr. Coyne: I object to that question as to whether or not the services of an authorized carrier performing these services would be adequate, not whether he would want somebody else in addition to them.

Exam. Roberts: Objection overruled.

What is your answer?

A. No.

Exam. Roberts: Do you control the routing of your shipments?

The Witness: Yes, I think so. We are not always arbitrary about it. We frequently ask the shipper to send it the fastest, most convenient way. Sometimes we do specify a road at this end, but we never specify a road at the other end. Freight solicitors call on me, and I may specify the Milwaukee.

Exam. Roberts: Would you specify a motor carrier service?

The Witness: Yes, I think so.

Mr. Morken: I have nothing further.

Recross examination.

By Mr. Coyne:

Q. So far you have not used a motor carrier from Berry, Vermont, to your place of business?

A. That is correct.

Q. One hundred per cent rail?

A. Yes, sir.

[fol. 98] Q. You came to this hearing to support one motor carrier so that you would have one motor carrier service available?

A. I believe so.

Q. Then, if you have learned now that there is available to you a motor carrier service offering the exact same service as proposed by this applicant, the purpose for which you came to this hearing will be fulfilled?

A. I would like to have ten services, if possible.

Q. Not because of a need, but because of a competitive point of view?

A. Not entirely, but feeling that one probably wouldn't be able to give us the service that we would have if two or more were available.

Q. How frequently would you use the services of one carrier?

A. It is very difficult to answer, because we have had everything come by rail, and it is only now that I have discovered that there is even a possibility of having it come by truck. I would guess six or eight times a year, maybe more frequent. It would depend on the volume of business and the circumstances.

Q. Will you tell Mr. Roberts to the best of your approximation how frequently you would want it or how much you would want, whether it is split load or not? In other words, tell him what your requirements are as you see them now and are going to be for the future.

Exam. Roberts: He answered as to the frequency of service.

[fol. 99] A. I wouldn't be able to give you an answer to tonnage at all, because we frequently have one or two large things, a mausoleum or a large monument.

Q. In one particular year that would be more tonnage than several shipments for three or four years?

A. My best opinion is that we would use that service six or eight times a year.

Exam. Roberts: A complete truckload each time?

The Witness: No, sometimes a complete truck and sometimes a case of getting one particular monument or one

particular unusual marker or perhaps two or three monuments.

By Mr. Coyne:

Q. Now, each time that you would want to use that truck you would be in a position to call the carrier to tell them that your shipment is ready, would you not?

A. No, the other end takes care of calling them that the shipment is ready. We don't know when the shipment is ready.

Q. Are you willing to inform the other end or advise the other end whoever it is to ship by, say, Granite City Transfer?

A. I would much prefer to advise the other end to ship by the quickest motor transport in those cases where I thought it advisable to use motor transport rather than specifying a particular motor transport.

Q. In other words, you are not concerned with who the carrier is, but you are concerned with the service they render to you?

A. That is absolutely correct.

[fol. 100] Q. Now, your services that you received from Mr. Dingman's Granite City Transfer in the past have been satisfactory to the best of your recollection, have they not?

A. Now my previous answer I indicated that I am not certain that we have used that service. He may be able to tell you better than I. I do know that a fairly large percentage of our shipments come either by Raymond Brothers or by our own truck.

Q. Now, on the shipments from Berry to your place of business, that would occur maybe six to eight times a year, and would they be spread apart?

A. In time?

Q. Yes.

Q. Yes, sir.

Q. Approximately a month apart, two weeks apart?

A. There would be no regularity. We might want four shipments in the month of April and we might not want one from November to April.

Q. But each time that you wanted a truck movement you would be in a position to either notify the carrier yourself, or do the shippers out east notify the carrier for you?

A. I presume we could go to that trouble, yes. We don't always do that, even with the rail shipments.

Mr. Coyne: That is all.

Exam. Roberts: Mr. Cronon?

[fol. 101] Mr. Cronon: No further questions.

Mr. Morken: That is all.

Exam. Roberts: You may be excused.

(Witness excused.)

Mr. Morken: I will call Mr. Stengel.

JAMES STENGEL was sworn and testified as follows:

Direct examination.

By Mr. Morken:

Q. Will you state your name, please?

A. James Stengel.

Q. S-t-e-n-g-e-l?

A. That is right.

Q. Where do you live?

A. In Milbank, South Dakota.

Q. With what company are you connected?

A. Dakota Granite Company.

Q. What is your position with the company?

A. Secretary-Treasurer.

Q. You are an officer of the corporation?

A. That is right.

Q. Are you a part owner of the company?

A. That is right.

Q. Do your duties as secretary and treasurer cover the transportation matters and problems and handling of the Dakota granite?

A. Yes, they do.

[fol. 102] Q. You are familiar with this application in the proposed service of Mr. Schaffer?

A. I am.

Q. Will you describe what the Dakota Granite Company is and whether you are a manufacturer or distributor and just what your business is?

A. Well, we quarry and fabricate and letter according to retail dealer's specifications, and we ship strictly wholesale to retail outlets.

Q. Milbank is in Grant County, South Dakota?

A. That is right.

Q. Will you describe what is available there as the raw material that you manufacture and ship?

A. Well, Grant County has a granite ledge of a reddish-brown nature that is quarried and manufactured into mausoleums and monuments and building work since 1908. It is peculiar in the fact that it is an out-cropping of the granite ledge. It is an out-cropping, well, it is a red rock, that is what it is.

Q. Are there certain trade names or descriptions that go with this particular type of granite that you handle?

A. It is called Dakota Mahogney and Royal Purle, and there are quite a few variations in that color, American Rose, American Boquet, there are quite a few trade names they are all from that area and pertain to that same granite. It is a reddish-brown granite. In some cases it is quite red and in some cases almost blue.

[fol. 103] Q. Is there a supply of similar granite any place in the United States.

A. Well, there is no supply of granite that you could call identical in any respect. Anyone can tell the difference by looking at two pieces from a different area. There are other red-blue and brown grain granites, but they are different textures, and they look quite different.

Q. Does it have the area that the previous witness testified about, very similar granite?

A. No, they don't.

Q. Does the Dakota Company own quarries as well as manufacture?

A. Yes, we do. We have two quarries.

Q. Are there other producers, such as your company, in Grant County?

A. Yes, there are. There are two, Robert Hunter Granite Company and Rush Brothers in Ortonville.

Q. That is Ortonville, Minnesota, and it is just over the Minnesota-South Dakota border from Grant County?

A. That is right, they have an address also in Bigston, South Dakota, which is in Grant County.

Q. You gave your address as Milbank. Is your establishment located within the city limits of Milbank?

A. No, it is seven miles out, six miles east and one mile south of Milbank.

[fol. 104] Q. Are you on a rail siding or rail trackage?

A. No, we aren't. We are about six and a half miles from the nearest rail siding.

Q. At the present time how are you handling your outbound shipments from Grant Count?

A. Well, we are shipping by truck, by full carload, by common carrier truck, and by less than carload shipments.

Q. Less than carload on the railroad?

A. On the railroad, that is right.

Q. What railroad do you use and what truck service do you use?

A. We are using the Schaffer Trucking Company and the Milwaukee Road since it is the only main line through our town. We use the Milwaukee on all carload shipments and L.C.L. shipments. The dealer himself routes the car or it isn't routed at all. It is up to the discretion of the railroad.

Q. Before we leave this background on your business, do you ship your type of granite into Vermont?

A. Very little, but we do ship into Vermont.

Q. And by the same token, the different Vermont Granite is shipped into Minnesota and into South Dakota?

A. That is right, right into Milbank.

Q. The type of granite that you produce and ship, what is its purpose, its eventual use?

A. I would say ninety percent of it is monuments, memorial work, and the other ten percent would constitute [fol. 105] buildings and mausoleums and structures that are not memorial work.

Q. Building fronts and building finishing?

A. That is right.

Q. You said you are using Mr. Schaffer at the present time?

A. Yes.

Q. About how frequently?

A. Between two and three trucks a week, sometimes as many as four, and there has been a week once in a while when we don't ship at all. We have an annual vacation, and then there are weeks other than the annual vacation where we don't happen to have any truckload ready during that week. I would say we would average two and a half truckloads a week, possibly three.

Q. Do you operate any trucks of your own?

A. We have one truck of our own.

Q. I gather that this Hunter concern is a competitor in the same business in the same area?

A. That is right.

Q. Do you know if they operate trucks of their own?

Mr. Coyne: That is objected to as being immaterial. If they have a man from Hunter's, they should have him on there.

Exam. Roberts: You may answer the question. I don't want any interrogation on the Hunter case.

A. They have. To my knowledge at the present time they are operating three trucks over the road, and they propose to put on one more unit.

[fol. 106] Q. They do not go for common carriers, they are private carriers?

A. That is right.

Q. And you only one truck in private carrier?

A. That is right.

Q. What have you to say with regard to Mr. Schaffer's existing service to you, how has it been, the speed, and what-not?

A. Well, as Mr. Schaffer testified, we have about a five-day delivery into Ohio and western New York state and about six days into eastern New York state. We usually have a truck there the day we call for it. He has waited three or four days for us, and we have also waited three or four days, but the service has been very good.

Q. As a general rule does he have a truck available for you when you call for it?

A. Yes, he does.

Q. What has been your record with using Mr. Schaffer on claims?

A. We have had two that I can remember. I think we have only had two claims.

Q. Over how many years?

A. Since the beginning of '50.

Q. Were those taken care of satisfactorily?

A. Yes, they were.

Q. Now, the applicant is requesting an extension of his authority from Grant County to seven states, North Dakota, Wyoming, Texas, Arkansas, Louisiana, West Virginia——

[fol. 107] Exam. Roberts: That is eleven states.

Mr. Morken: Ten and the District of Columbia, and Arkansas, Oklahoma, West Virginia, Maryland, District of Columbia, Massachusetts, and Vermont.

By Mr. Morken:

Q. Now, do you in your business have any need for this proposed service to that area?

A. Yes, we do.

Q. Will you tell us what the need is, please?

A. Well, at the present time we are starting a new salesman in Texas, and it is almost impossible to start a new salesman in any area and expect him to develop a carload shipment into that area, as L.C.L. rail is rather high, as far as the dealer is concerned, since he looks at the price he gets the shipments from the other districts, and he notices the difference in the freight. We would like to be in a position to organize a truck shipment into that area since we would only have to have about twenty-four thousand pounds to ship by truck into Texas whereas at the present time it would take fifty thousand pounds, and it is almost impossible to organize that large a group that will buy our merchandise without first seeing our merchandising and so forth. As far as New England is concerned, we have shipped previously into New England, and quite often carload to Chicago and L. C. L. rail from Chicago into the New England states, and I wouldn't be able to give you any detailed information on how long that takes, but quite fre-

[fol. 108] quently weeks after we have shipped merchan-

dise we receive a letter from one of the customers wanting to know where his merchandise is.

Q. Does that happen quite frequently?

A. I could produce some letters from our file. It hasn't happened recently and I think that is one of the very good reasons our services have been much poorer to Connecticut than our competitors' services have been. I have with me a list of customers that would like to have service into Connecticut and Massachusetts.

Q. Can you name off the towns where these people reside?

Mr. Cronon: I think I will have to object to that.

Mr. Coyne: I would like to ask the witness who controls the routing on these movements.

The Witness: Well, we ship them into Chicago, and from Chicago J. S. Long takes care of them.

Exam. Roberts: Who is J. S. Long?

The Witness: He is a granite distributor, 2610 Southwestern Avenue.

Exam. Roberts: If you would use this motor carrier service to the New England states could you control the routing?

The Witness: Well, to a certain extent there wouldn't have to be any routing if there was only two or three stops on the way, the load would be organized so that we would know what stops were first.

Exam. Roberts: Would you select the carrier?

[fol. 109] The Witness: Yes, we would.

Mr. Coyne: Who pays the freight on them?

The Witness: The customer.

Mr. Coyne: You do not pay it in any instances?

The Witness: No.

By Mr. Morken:

Q. In your present operation, if a customer requests that you ship it either rail or truck, do you respect that customer's request?

A. Yes.

Q. As a practical matter can you give us any percentage on what the customers request, do they request rail or truck or do they leave that part of it open?

A. The majority of our customers are requesting truck shipments on less than truckload lots. When the order is very small, under five hundred pounds, quite commonly they request L.C.L. shipment, or if they are in an area that is served by one of the dry freight truck haulers they request whichever carrier may serve them the best. For instance, Nebraska and Iowa usually request Wilson delivery on orders less than five hundred pounds. It is usually replacement pieces, and they want that in a hurry, and they will take it any way they can get it.

Exam. Roberts: Let's confine your need for service to these proposed states.

By Mr. Morken:

Q. You mentioned you had a salesman now working in Texas. Do you have salesmen working in these other states? [fol. 110] A. Yes, we do, not all of those states, but the majority of them. We have salesmen in the New England state, Texas, Arkansas, North Dakota, Colorado, and one in West Virginia.

Q. Do you have orders on file now with your company for shipments that will be shipped to these states?

A. Yes, we do.

Q. Now, can you name us some of those points?

A. North Haven, Connecticut, Greenfield, Massachusetts, New Brighton, Connecticut, Bristol, Connecticut, Wooster, Massachusetts, Waterbury, Connecticut, Dallas, Texas, Lubbock, Texas, Jasper, Texas, Paris, Texas, and Waco, Texas.

Q. Those are the points where you now have orders on file?

A. We now have orders on file and the customers would like truck delivery.

Q. Is there any unusual project in North Dakota in which you are interested?

A. Well, there is a project, the Peace Garden, which is being built in conjunction with Canada. They are using a large amount of granite for terraces and steps, and we are supplying them with that granite.

Q. Do you have the contract for that?

A. We have the contract, and they would like truck delivery.

Q. Do you kow about where that is in North Dakota?

A. Is is on the Canadian line and about in the middle of the state.

[fol. 111] Q. In your business do you sell to one distributor in the state or do you sell to anyone in the state who is in the monument or building business?

A. We sell quite a number in each state. We usually limit our customers to one in each town. That is as far as we limit them.

Q. Can you name me a state and tell me how many dealers there would be in it, as an example?

A. Are you speaking of one of these proposed states?

Q. If you can give me one of those.

Exam. Roberts: Let's confine our questions solely to the states involved in this proceeding.

By Mr. Morken:

Q. Do you know how many dealers you have in one of the proposed states?

A. Well, Connecticut, we are now selling to about thirty-five dealers in Connecticut.

Q. Are there more than thirty-five dealers in Connecticut?

A. Yes, I would estimate there would be about a hundred, and that is a rough estimate.

Q. Are they all potential customers of yours?

A. Yes, they are.

Q. Now, if this proposed service is granted, do you know about how frequently you would use it?

A. Possibly about seven or eight times a year in that particular area.

Exam. Roberts: New England area?

[fol. 112] The Witness: Yes.

Into the Texas area it is impossible to say right now just how often we would use the service. For the next year we wouldn't use it very often, but it would gradually pick up.

By Mr. Morken:

Q. I notice that in May of 1951 Mr. Schaffer hauled a load from Grant County and delivered to nine different destinations in Iowa, Kansas, and Oklahoma. Now, for Oklahoma would it be possible to put the Iowa and Kansas loads on the truck and put Texas shipments on a truck that is going to Oklahoma?

A. That would be very possible.

Q. Have you ever used Mr. Dingman's service, the Granite City Transfer Company, or are you familiar with that carrier?

A. I am. I haven't used it in the last two years, and before that time the traffic department was handled by Mr. Jergins, and I believe he used it once or twice. I am not in a position to say just exactly how many times the service was used. I know, however, it has been used.

Q. But not in the past two years to your knowledge?

A. No.

Q. Do you know if Mr. Dingman has any equipment or office or setup in the vicinity of Grant County, South Dakota?

A. I don't know of any.

Q. Have you ever been solicited by anyone from that company?

A. Mr. Dingman was over last summer and left his tariff, [fol. 113] and that was the only time he has been over.

Q. He didn't ask you for any business, as I understand it?

A. Well, he left his tariff. I imagine that is a request for business.

Exam. Roberts: Let's proceed, gentlemen.

By Mr. Morken:

Q. Would the fact that a carrier doesn't have any equipment in your area and you have to call long distance be a handicap in your business?

A. Yes, I think it would be.

Q. Why is that?

A. Well, if we called him in the morning and expected him to load a load that day, the best he would do would be

over in three days, if he had the truck running outside his door, and quite often we find ourselves with two or three trucks in the yard waiting to load. A customer comes in with his own truck, and it is much more convenient to be able to call up and ask for a truck in a half an hour. We can work it in, and continually load that way, without having to schedule our customers according to our public carrier.

Exam. Roberts: Any need that you wold have for service would be strictly one-way movement, would it not?

The Witness: That is right.

By Mr. Morken:

Q. Now, has Mr. Dingman ever promised you any service or tried to arrange any service into, say, Texas or Arkansas or Oklahoma or Connecticut?

[fol. 114] A. No, he hasn't.

Q. Or any of the other states that are involved here?

A. No, he hasn't. He left his tariff. I studied it for a little while. Texas may be included in his tariff, I couldn't tell you.

Q. Does Mr. Dingman hold out a split delivery service such as Mr. Schaffer offers you?

A. Well, Mr. Schaffer's split delivery service——

Exam. Roberts: Let's be responsive to the question.

By Mr. Morken:

Q. Does he hold out a split delivery service?

A. He has a spiit delivery service.

Q. Is it feasible to use Mr. Dingman's split delivery service?

A. No, in most cases I would say not.

Q. Why is that?

A. His rates on split delivery, his full truckload rate and his split delivery rate are quite different, and his split delivery is a great deal higher than his full truckload rate.

Q. Would you call his tariff rules in effect a bar against that type of traffic?

Mr. Cronon: I think that question is improper.

Mr. Morken: I am not talking about rates.

Exam. Roberts: Let's not argue. Let's proceed. It is a question of rates rather than a question of service.

Mr. Morken: He answered the question.

The Witness: Yes, I did.

[fol. 115] Exam. Roberts: Any further questions, Mr. Morken?

Mr. Morken: No, you may cross-examine.

Cross examination.

By Mr. Coyne:

Q. What is your predecessor's name?

A. My father, Mr. E. G. Stengel, who was secretary and treasurer.

Q. Who was traffic manager?

A. Mr. Joe Jergins.

Q. How long have you been in with your company now?

A. Well, I have been around the company all my life. I have been in my present position two years.

Q. Now, you have been around that company all of you life. Isn't it a fact that your company used the services of Mr. Dingman, the Granite City Transfer, very, very regularly two and three years ago?

A. I am aware that we used Mr. Dingman two or three years ago. I can't say it was very regularly, because at that time we were shipping mostly carload.

Q. But you know that you were using them at such times as you were using motor carrier service?

A. That is right.

Q. And isn't it a fact that about that time Mr. Schaffer came along and secured some authority and solicited business from your company at lower rates than Mr. Dingman had been offering your company?

A. Well, I am not in a position to say that Mr. Schaffer's [fol. 116] rates were lower when he solicited our business in the first place. If I understand it correctly, I believe Mr. Dingman's rates have gone up since that time, and on full truckload rates I am not at all sure that Mr. Schaffer's rates were lower than Mr. Dingman's rates.

Q. Well, at the present time Mr. Schaffer's rates are considerably lower than Mr. Dingman's rates?

A. They are.

Q. And you have been using Mr. Schaffer exclusively?

A. Yes, we have.

Q. You testified that Mr. Dingman came over even after the business had been cut and left his tariff with you and discussed the possibility of getting business from your company?

A. Yes.

Q. So you are aware by reviewing his tariff and his rates and the discussion with him that he is authorized to transport this granite from Grant County, South Dakota, to certain New England and eastern states?

A. I am.

Q. And to refresh your memory, those states that he is authorized to serve in the New England states for which the applicant is seeking authority here today are Vermont, Massachusetts, Connecticut, Maryland, and the District of Columbia, isn't that correct?

A. Yes.

[fol. 117] Q. Now, Mr. Dingman is located in St. Cloud, Minnesota, isn't he?

A. That is right.

Q. And as you stated if he had his trucks running he would be over there in three hours to pick up your shipments?

A. That is right.

Q. Now, these shipments that you send out are orders in many cases that you fabricate and prepare and work on for quite a length of time?

A. That is right.

You know more than three hours ahead of time when those shipments are going out, don't you?

A. In many cases, but not in all cases.

Q. And Mr. Dingman only charge you for services from your place of business to the destination?

A. That is correct.

Q. So Mr. Dingman is able to get equipment over to you in ample time to move your shipments out of Grant County to any of these points?

Mr. Morken: I object to the form of the question as being a misstatement and assuming facts not in evidence.

Exam. Roberts: I think Mr. Coyne should rephrase the question.

By Mr. Coyne:

Q. So according to your testimony that you in most instances had more than three hours to secure transportation [fol. 118] facilities and that Mr. Dingman can have trucks over there in a minimum of three hours, then there is no delay?

Mr. Morken: Same objection.

Exam. Roberts: We don't know that Mr. Dingman can have it over there at that time. I think you should do less testifying.

Mr. Coyne: I will withdraw the entire question.

By Mr. Coyne:

Q. Your service that you had from Mr. Dingman, except for the rate differential, was a satisfactory service, wasn't it?

A. No. Quite often I wasn't told, as I wasn't there at the time.

Mr. Coyne: Just a minute.

Mr. Morken: You asked him, and it is going to hurt. Now, let him answer.

Exam. Roberts: Mr. Morken, please be quiet.

A. I was told that quite often we had to wait a week and longer than a week, and I am afraid that would be all I would answer.

Mr. Coyne: I ask that be stricken on the grounds of hearsay.

Exam. Roberts: The record will stand as it is.

By Mr. Coyne:

Q. To your own knowledge you have not used Mr. Dingman's services since you have been traffic manager, have you?

A. That is correct.

Q. So you, of your own knowledge, have no complaint whatsoever about his service?

A. No, I don't.

[fol. 119] Q. Now, you know that his service exists from South Dakota to the eastern states that I named before, don't you?

A. Yes, I do.

Q. You have not utilized his service whatsoever?

A. No, we haven't.

Q. If this application is granted here you will use the applicant to those eastern states, will you not?

A. That is correct.

Q. And I presume you are here today to testify that if the applicant's services are granted that that motor carrier service will satisfy your requirements?

A. I would say we will use it. Whether we will be satisfied with it or not, I wouldn't be in a position to say.

Q. Do you know of any reason why you won't be satisfied?

A. No.

Q. To the best of your knowledge you will be?

A. I expect to be satisfied with it, yes.

Exam. Roberts: What has been your dissatisfaction with the existing service?

The Witness: I have no complaint against the existing service. I would rather not say that I would be satisfied with a service that doesn't yet exist. I haven't had a chance to judge it. That is about all I could say on that question.

By Mr. Coyne:

Q. Would a service that would transport either full truckload or split delivery full truckloads from your place of [fol. 120] business to points in the eastern states that I have named meet your present transportation requirements to those states?

A. I would have to qualify that statement. I would have to be able to consider the rates on that split shipment, because the majority or practically all of our shipments into that area, since it is so close to Berry, are small shipments, split shipments, and although the stops might only be ten miles apart, those rates will have to be fairly com-

petitive, because they will be competing with granite from the Berry area.

Q. In other words, as I construe your answer, such a service would meet your requirements with the qualification that the rates might seem too high in split deliveries, is that your answer?

I would have to qualify that, too. If we could expect service when we called for a truck and if the rates were competitive with rail rates and other types of carrier rates or carload, pool carload to Chicago rates, I would say it may meet our needs.

Q. Now, you have competitors located in St.Cloud, Minnesota, do you not?

A. We do.

Q. Those competitors in St. Cloud sell to essentially the same trade and market in the eastern states that I name that Mr. Dingman serves?

A. That is true.

Q. Are you aware of the fact that those competitors all [fol. 121] presently use Mr. Dingman's Granite City Transfer services on full load and split delivery shipments to th same destination territory?

A. I am aware that they do, but they also are in a far different position than we are, being only one company in St. Cloud, the particular dealer can save so many pounds of each of these various companies he would like to have yo deliver, and by that way that split rate wouldn't be nearly as high, whereas we can only ship to that one dealer. They can organize a pool in St. Cloud, and we can't.

Exam. Roberts: I think the rate situation is cleared up here now.

Proceed.

Mr. Coyne: I believe that is all.

Exam. Roberts: Mr. Cronon?

Cross examination.

By Mr. Cronon:

Q. Mr. Stengel, referring to the states which Mr. Schaffer wants to serve, have you had any rail carload shipments to any of those states out of Milbank since January 1, 1952?

A. No, we haven't.

Q. Have you had any rail less than carload shipments since January 1, 1952?

A. We have had carload to Chicago and rail out from Chicago.

Q. You mean truck to Chicago?

A. Truck to Chicago and rail from Chicago.

[fol. 122] Q. Was it a full truckload from Milbank to Chicago?

A. Yes, it was.

Q. Referring to those orders which you have on file, are they firm orders on which money has been paid down?

A. No, but I would estimate that ninety-nine percent of them would be accepted and delivered. In our business when an order is placed, since it is a different size, since it is the specifications of the dealer himself, very, very seldom do they cancel the order.

Q. Are any of those shipments now ready for delivery?

A. I would say, yes, about half of them are.

Q. Now, why don't you tender them to some form of transportation and get them delivered?

A. We intend to. We have committed ourselves. They will have to go by truck, and we will have to have less than a truck and deliver them.

Q. Why will they have to go by truck?

A. They were requested truck.

Q. Why did the customers request truck delivery?

A. Well, in one case our salesman in New England didn't think he could organize a carload for that area, but he thought he could get about twenty-five thousand pounds, which he did, and so we will have to ship that by truck, since we don't have our minimum of fifty thousand. One New England customer has a carload on order now, and that will be delivered carload, of course.

[fol. 123] Q. Tell me, on these small shipments to Vermont, why have you held up delivery and not called upon Dingman to deliver those shipments?

A. Well, we could secure just as good service and faster delivery in all probability, that is an assumption of course, and the rate would be about the same if we shipped the carload to Chicago and L.C.L. from Chicago to the destina-

tion, and except for the truckload that we now have on orders, that is the way we have been handling those shipments.

Q. Are these customers of yours pretty much interested in the transportation charges?

A. Well, as far as the east coast the transportation charge means quite a bit in the price of a monument.

Q. Do you think that is one of the reasons why some of your people prefer shipping by truck?

A. I think the biggest reason is that they can get split shipments and small split shipments at a reasonable rate and faster, usually, and they are assured that they will get there without any damage.

Q. Have you had damage in using some of the truck lines?

A. We have had considerable damage in using dry freight carriers. I would say very roughly we have had about one out of every four pieces by using dry freight carriers.

Exam. Roberts: Dry freight, you mean general com-
[fol. 124] modity carriers?

The Witness: That is right.

By Mr. Cronon:

Q. Would you explain this operation out of Chiago, is that where they assemble small shipments for movement to the east?

A. No. We assemble the car and ship the car to J. S. Long, and he distributes the car from there on a L. C. L. rail.

Q. What is he, a sort of a broker?

A. That is about what it is, a distributing agent. His job is simply to transfer from our car to L. C. L.

Q. I understood you to say they were carload shipments out of Chicago.

A. Carload to Chicago, and L. C. L. from Chicago.

Q. When was your last carload to Chicago?

A. About two weeks ago.

Q. Did you hear Mr. Schaffer testify?

A. I heard, I think, the majority of this testimony.

Q. What I have in mind particularly is his statement that the granite which you quarry around Milbank is consider-

ably different than the granite which is quarried at Berry, Vermont. Did you hear him say that?

A. I heard him say it was quite similar at one time in his testimony except for color.

Q. You said that you want a new transportation service so that you can compete with carriers in Vermont?

[fol. 125] A. The quarries in Vermont, they don't manufacture only Berry granite, they import granite from Finland and Sweden, and those granites are colored and they are quite competitive with our line. At the present time there is a very small percentage of that type of working being done, but it is picking up, and it is competitive with our line.

Q. The longer you get away from the base of your operations the harder it is compete?

A. That is right.

Q. And the reason is because the transportation costs have gone up, is that correct?

A. That is correct.

Mr. Cronon: That is all.

Redirect examination.

By Mr. Morken:

Q. Mr. Stengel, the gentlemen seemed to infer that your interest in this proceeding is in rates, as far as your supporting Mr. Schaffer in your using him at the present time. Is it his rates that is primarily the main or the big point or what is your reason for using him and why are you here?

A. From our standpoint it is much more economical for us to load a truck under our own crane at our fabricating plant than to have to haul it seven miles into town.

Q. And by using Mr. Schaffer, he backs his trucks into your yard?

A. He backs a truck into our yard, and he loads it, and he checks it out, and from the time it is checked out we are [fol. 126] reasonably sure that it will get there in good order, his service is fast, and he has very little breakage, and the dealers in many cases call for his delivery, very many cases.

Q. I assume his picking it up at your plant rather than your driving it into Milbank saves you money?

A. Quite a bit of money.

Q. And you are interested in saving that money?

A. Absolutely. There is another savings.

Q. Are there any other savings?

A. Well, on truck shipment you don't have to spend as much time or money crating the monuments, because they are only handled once, they put them on the truck, and the only other time they are handled is when they are slid off on the dealers show yard so they save considerable office work, because we don't have to file as many claims.

Q. Do you consider those savings rate matters or service matters or both?

Mr. Cronon: That is objected to as calling for a conclusion of the witness.

Exam. Roberts: I think the witness may answer, but I think you should propound one question at a time of the witness.

Mr. Morken: I will remember that in the future.

A. They lower our cost of operation, and they allow us to give better delivery at a lower price per monument, and you would almost have to call them both.

[fol. 127] By Mr. Morken:

Q. And that is the reason why you are here today?

A. That is right.

Q. Do you recall when Mr. Coyne was talking to you and you said that you had never used, I believe; do you recall the question you said you had never used?

A. No, I don't.

Mr. Morken: That is all.

Recross examination.

By Mr. Coyne:

Q. Mr. Stengel, you just pointed out certain economic savings to the applicant's counsel by use of Mr. Schaffer's truck. Those same economic savings are available to you,

as far as your company is concerned, if you were to use Mr. Dingman who has comparable equipment, isn't that correct?

A. Well, I imagine I make at least two telephone calls to Mr. Schaffer a day, and I would have to do the same thing to Mr. Dingman in St. Cloud, and that in itself would run high.

Q. In other words, then, is it your testimony that the only difference between Schaffer's and Dingman's expense to your company from an economic point of view would be the telephone calls?

A. I wouldn't be able to say that definitely, because I don't know how many claims we would have to put into Dingman's transportation service, and I don't know how many man hours we would waste waiting to load a truck, and I don't know how we would have to crate our merchandise, if [fol. 128] if we would have to crate it better or possibly wouldn't have to crate it as well, to assure safe delivery, but it is one of the incidentals that would be definitely different.

Q. Well, now, tell me this, because we want to see whether this is a comparable service, how much crating do you have to do for Mr. Schaffer?

Mr. Morken: Mr. Examiner, I am going to object to this question. The witness has testified that he hasn't used Mr. Dingman for two years and his only contact has been one time, and he has just nothing to compare on a comparable service, and I think the question is improper.

Exam. Roberts: I think Mr. Coyne can show at the proper time what the service of Mr. Dingman is and whether or not Mr. Dingman is——

Mr. Coyne: First I want to ask this witness what he gets from Schaffer.

Exam. Roberts: I have no objection to your asking him on the matter of loading.

By Mr. Coyne:

Q. How much crating do you do for Mr. Schaffer under these operations?

A. That question, I think, is practically impossible to answer. You would have to specify what particular piece and what size you want crated.

Q. I will ask you this then; Mr. Schaffer uses flat bed [fol. 129] equipment, does he not?

A. Yes.

Q. And you do crate your pieces of granite to a certain extent, isn't that correct?

A. Except for building fronts, and then he holds them on the truck himself and puts on his own crating.

Exam. Roberts: I think, Mr. Coyne, that the witness testified that there were certain operating economies by use of Mr. Schaffer. I think you can develop at the proper time whether or not your client operates over those same economies.

Mr. Coyne: When this witness is gone, we don't know what services Mr. Schaffer offers him.

By Mr. Coyne:

Q. If Mr. Dingman offered you the same identical services and facilities as Mr. Schaffer, would you use his services?

Mr. Morken: I object to that as assuming something that is an impossibility, as no two men can do exactly the same thing.

Exam Roberts: Let's not be too technical.

I will allow the witness to answer the question.

A. Not under the present tariff.

By Mr. Coyne:

Q. In other words, the whole thing with Dingman and Granite City Transfer boils down to a rate question?

A. No, I wouldn't say that; on a full truckload rate we could use Dingman's services very well.

Q. Are you willing to use Dingman on full truckloads to [fol. 130] those eastern states?

A. We would rather use one supplier.

Q. Are you willing to negotiate to discuss rates with Mr. Dingman on split delivery shipments?

A. We will.

Q. And if Mr. Dingman, subject, of course to O. P. S. and I. C. C. approval, is able to negotiate competitive rates with you, then his services should satisfy your requirements to these eastern states entirely, should they not?

Mr. Morken: I am going to object to this type of questioning, as it is arguing and trying to confuse the witness.

Exam. Roberts: I think we have had enough on the rate business. I think the matter of comparison should remain as to service. The rate is very clear as to what the rate situation is.

Mr. Coyne: I think the record is clear on everything. I will ask no further questions.

Recross examination.

By Mr. Cronon:

Q. Mr. Stengel, when you ship by rail do you haul the shipments down to the Milwaukee Railroad, down from Milbank in your own trucks?

A. Yes, we do. No, we don't. Those trucks are owned by Annette Trucking Company. He is a private carrier. He hauls for us down to the rail siding. He hauls also L. C. L. shipments into town and dry freight carrier into town.

[fol. 131] Q. Does he load the shipments onto the flat cars?

A. He uses our crane to load the shipments, and we have control of his trucks, that is to say, they are there all the time, and he is there all the time, but he owns the trucks.

Q. Have you had any considerable amount of damage on that which he handles?

A. Very little.

Mr. Cronon: That is all.

Exam. Roberts: You may be excused.

(Witness excused.)

Exam. Roberts: Gentlemen, it is 12:15, shall we adjourn for lunch?

Off the record.

(Discussion off the record.)

Exam. Roberts: On the record.

We will take a five-minute recess, and then call Mr. Schaffer for cross-examination.

Exam. Roberts: We will come to order.

(Short recess.)

AUBREY WILLARD SCHAFFER resumed his testimony as follows:

Cross examination.

By Mr. Coyne:

Q. Mr. Schaffer, do you presently haul silican carbide from Niagara Falls?

A. Yes, I do.

[fol. 132] Q. Referring to Exhibit 6, Mr. Schaffer, how manh of these tractors and trailers are exclusively assigned to granite hauling?

A. Six of them.

Q The others are used in your dry freight operation and your grain and sale operation also?

A. Dry freight operation only.

Q. And the six that you use are which ones, the first six?

A. The first six.

Q. And they are all Ford power engines, is that correct?

A. Right.

Q. Now, referring to your Exhibit 7, page 1, which is your balance sheet, you have a total value of your equipment at twenty-two thousand seven hundred twenty-five dollars and twelve cents.

A. Just a moment, please. What was that item again, please, on what page?

Q. Page 1, your Assets show Trucking Equipment and Cars and Less Depreciation Reserve of twenty-two thousand seven hundred twenty-five dollars and twelve cents. Is that the correct figure for all of your trucking equipment and cars?

A. Yes.

Q. You say you have fourteen all told, is that correct?

A. Yes.

Q. And eight of them, I gather, including your car, are used on your dry freight and your salt and other operations?

[fol. 133] A. I beg your pardon, I didn't get that question, please.

Q. You have fourteen complete units, including your car, is that correct?

A. Yes, I believe that is all. I believe I testified fourteen or fifteen.

Q. And all but these first six are used on your dry freight operation and your salt and grain hauls, is that correct?

A. I don't follow you on that question. All but six of them, you say, are used on the balance of the operations, is that the question?

A. Yes.

Q. And are those eight that are used on other operations in good condition?

A. Yes.

Q. Well valued?

A. Well, there are some of the grain operation that was used equipment that was purchased, in fact, it was taken over from a friend of mine, and reconditioned for that work.

Q. The value of those eight plus your car certainly exceeds the value of the six that you have in the granite hauling, don't they?

A. I wouldn't say that, because our best equipment is used on the granite hauling.

Q. The best equipment. The average value of your com-[fol. 134]plete unit on your granite hauling is more than two thousand dollars, is it not?

A. What was that?

Q. Is the average value of a complete unit on your granite hauling more than two thousand dollars?

A. Well, the way it is set up, it depreciated down on a depreciation basis, and it would be depreciated down to that, because we depreciate our trucks down in five years.

Q. Then all of these forty-eight units are depreciated in three full years and going on their fourth year now, is that correct?

A. They are going on their fifth year

Q. Under those terms of depreciation you are going to be needing new equipment very shortly?

A. Not necessarily, because that equipment has been maintained, taken care of, by our mechanics, two full time men, and today it is in very good shape, first class mechanical condition, and within the last sixty days it has all been inspected and approved by the I. C. C. road checks safety appliances, brakes tested, and all the requirements that are

required by the I. C. C. have been approved on them. There just recently was five new motors installed and one completely overhauled, and at the present date it is in first class mechanical condition.

Q. Now, turning to pge 2 on the exhibit, as I understand it, that is an operating statement for the year 1951 covering all of your trucking operations, is that right?

[fol. 135] A. Yes.

Q. Did you have any legal expense during the year 1951?

A. Yes.

Q. What item is that under?

A. It isn't listed because this is taken from our income, federal income, tax returns, and our federal income tax is filed, and we are informed a year ago, we were called up before the Examiner of the Internal Revenue, and he said we could not deduct legal fees of any kind, and, therefore, it doesn't show that.

Q. Approximately how much were your legal fees pertaining to your trucking industry last year?

A. Very small.

Q. Would it be more than eight hundred dollars?

A. No.

Q. Then, are there any other items other than legal fees that you haven't included in your expenses?

A. No, legal fees was the only thing we exempted.

Q. Then, as a matter of fact, the profit on your trucking operation would be whatever the legal fees were under your eight hundred and forty-four dollar profit shown?

A. I suppose if it says that there, that is what it would be.

Q. Page 5 of this has reference to your granite operation in its entirety, has it not?

A. I believe so, yes.

[fol. 136] Q. And page 5——

Exam. Roberts: You mean page 4.

By Mr. Coyne:

Q. Pardon me, I am sorry, I mean page 4, which is your operating statement referring strictly to granite hauling shows a net loss of eight hundred and five dollars and fifty-two cents, is that correct?

A. That is correct. I might add to that——

Q. Just a minute. That granite trucking that resulted in this net loss of eight hundred and five dollars and fifty-two cents was composed partially of this split delivery haul, which the witness just preceding you now said was cheaper from you than other existing carriers, is that correct?

A. Possibly.

Q. Then, isn't it a fact that you have been transporting granite at rates which do not yield a fair profitable return for that transportation?

A. I would like to answer that question very briefly.

Q. Go ahead.

Q. A year ago we applied to a rate expert of the Public Utilities Commission in South Dakota for a straight ten percent increase of rates across the board on our tariff and were denied by the Commission at that time because of some reason pertaining to the O. P. A. They were denied, and we reapplied for them, and in turn were denied again. It has been approximately a year ago. Since that time we have participated in asking for a rate increase, but we have [fol. 137] been waiting the outcome of this hearing, depending upon the operations of what it would be, and then at that time if we were granted this authority, when they set up a new tariff, we would set it up all together.

Q. Mr. Schaffer, the Schaffer Transportation Company is a common carrier, is it not?

A. Right.

Q. Isn't it a fact that as a common carrier operates you would look to the I. C. C. itself for increases in rates on this type of rate haul?

A. We asked the I. C. C., and it was denied by the I. C. C. because of the fact that we merely used our fellow in South Dakota who published the rates originally for me, done the work for me, and we had the same man do it over, and it was denied by the Commission. We asked the Commission. He merely published those rates. He merely drawed up the necessary forms to go through to ask for this increase.

Q. Let's leave that, and I will ask you this: do I understand your testimony correctly that you want a rate increase and have wanted one, but haven't been able to get it?

A. We didn't at that time, and we haven't applied for six months.

Mr. Morken: That didn't answer the question.

By Mr. Coyne:

Q. Do I understand your testimony to be that you have wanted a rate increase, have applied for rate increases, but have not received them?

[fol. 138] A. A year ago we did, yes.

Exam. Roberts: That is enough on that situation. I don't want to hear any more on rates, Mr. Coyne.

Mr. Morken: I will make the offer that if Mr. Coyne is interested I know who prepared these applications for rate increases.

Mr. Coyne: I am not interested in that.

Exam. Roberts: This is not a rate hearing. We only talked about rates to see whether or not the shippers who desired were more interested in rates rather than service. I don't want to go into any——

Mr. Coyne: I would like to ask two questions, just following my thinking here now.

Exam. Roberts: I think you are taking advantage.

Mr. Morken: I think that you are out of order.

Mr. Coune: I would like to make this offer of proof, that what I propose to ask and what I was laying the foundation for was this——

Mr. Morken: Before they clutter the record, I think in making an offer of proof you have to know what the witness should testify and if he would testify in accordance with your offer now.

Exam. Roberts: Off the record.

(Discussion off the record.)

Exam. Roberts: On the record.

[fol. 139] By Mr. Coyne:

Q. Mr. Schaffer, would it be a correct statement of fact, then, to state in the record that it is your intention to increase your rates over what they now are?

A. Yes.

Q. If your rates are increased over what they now are, the shipper, particularly the last one who was here, will not enjoy as great a rate benefit as he has in the past and the differences between your services and Mr. Dingman's will be diminished in that respect, isn't that correct?

Mr. Morken: I object.

Exam. Roberts: Objection overruled.

The Witness: What was that?

Exam. Roberts: Let's go on.

(Question read.)

A. Well, I don't think they would be, we being local, I think.

Exam: Roberts Do you understand the question?

The Witness: Well, there is really two questions there.

Exam. Roberts: He asked you whether the differences in rates would be diminished.

Mr. Morken: He asked if the shipper would enjoy less of a difference. The shipper is not enjoying any difference at all as at the present time he isn't using Mr. Dingman.

Exam. Roberts: Let's let the witness answer. I think it can be answered either yes or no.

The Witness: I still don't understand yet thoroughly as to [fol. 140] what you are getting at there. I don't see in listening to his testimony whether there would be any difference as far as rates. I believe he testified that it didn't make—the rates was not too important a factor.

Exam. Roberts: I think the Commission can decide whether or not that is a question in this case.

Let's proceed, Mr. Coyne, in your cross-examination.

By Mr. Coyne:

Q. In the past your grain and salt operation and your dry freight and farm operations have been adding to support your granite operations, haven't they?

A. Not necessarily.

Q. They are your profitable operations, aren't they?

A. That is true, they are profitable. If you would let me

elaborate on that, and in our granite operation it shows here a eight hundred and five dollar and fifty-two cent loss. Now, as your client knows, the trucking business, you can put on six pieces of equipment a very large amount of money in tires. You can put a large amount of money into maintenance, and in our figure of our federal income tax the government has always accepted a cash return. We filed a cash return starting back when we first started in business, and we followed it through, and consequently, any repairs or tires that we put on those trucks are double expenses, and it is usually at the time of the year along in December that we maintain our trucks over the Christmas holidays, and before we overhaul our trucks, we retire them and [fol. 141] put on extras or get them in shape, because December is usually rather, in the granite business, a slow month, and we have put back into those trucks, as I testified here befor that they are mechanically in A-1 shape, a large amount of money into those trucks, mainly for the purpose, one purpose is, to eliminate the income tax, which is perfectly legal on a cash return basis. The government has accepted it. We have been checked on it, and they have approved the practice, and for that reason we did show a loss. If we let our equipment——

Exam. Roberts: Let's not go too far.

The Witness: We could have shown a seven or eight or nine thousand dollar profit vrry nicely, if they let our equipment depreciate. We lost one of our big shippers last summer to the favor of his own trucks, and he didn't stop because of rates.

Exam. Roberts: Now, I don't want you to go into a rate situation.

The Witness: I might add this——

Mr. Coyne: May it please the examiner, there is no question pending.

That is all.

Cross examination.

By Mr. Cronon:

Q. Mr. Schaffer, will you refer to your Exhibit 7?

A. Exhibit 7?

Q. Page 1.

[fol. 142] A. All right.

Q. That appears to be a balance sheet covering all of your various operations, is that right?

A. That is right.

Q. Do you have any balance sheet covering your granite hauling operation alone?

A. No.

Q. Why didn't you furnish such a balance sheet?

A. Well, because they were taken, as I said before, from our records that were filed with the Internal Revenue.

Q. Has your accountant ever prepared a separate balance sheet for your granite trucking operations?

A. I think on page 4 it shows the granite trucking business broken down separately.

Q. That is an income statement. I am asking about a balance sheet.

A. No, we don't.

Exam. Roberts: Do you keep separate books on all these operations?

The Witness: Yes.

By Mr. Cronon:

Q. Still referring to page 1 of Exhibit 7, where is the Rozum Motor Company located?

A. Rozum Motor Company?

Q. Yes.

A. Watertown, South Dakota.

[fol. 143] Q. Referring to your long-term items, are those real estate mortgages or chattel mortgages?

A. One is a real estate mortgage.

Q. Which one?

A. The bottom item.

Q. Thirty-six hundred dollars?

A. Right.

Q. And what is the three thousand dollar item on?

A. That is notes payable on equipment.

Q. About the sixty-eight seventy-five?

A. That is also notes payable on equipment.

Q. And then your note payable, total twelve hundred dollars, is that also on equipment?

A. That has been, but at that time that was notes payable on equipment.

Q. Page 2 of Exhibit 7, what does float and exchange mean under your expense item?

A. Float and exchange is check exchange.

Q. Explain the item "tolls and fines"?

A. Tolls and fines?

Q. Yes.

A. Tolls for when we cross toll bridges or cross states that special mileage tax is required.

Q. How about fines?

A. Fines are possibly violations, small violations, of some [fol. 144] item or another pertaining in the trucking business or possibly one particular item I remember was an item of my own personal card that is the company car. They run those in there together, the fines are very small.

Q. You mean a speeding fine?

A. It was particularly on my car, it was a speeding fine.

Q. That wasn't two thousand?

A. No, no, the biggest percent of that is tolls for crossings, and for illustration, the Pennsylvania Trunpike.

Q. Have any of your trucks ever been stopped and found to be overloaded?

A. No, not in—I think we had two violations of that in 51.

Q. Why did you say no?

A. I was referring to lately. I thought of this operation, so I included that.

Q. Page 4 of Exhibit 7, now, that is your operating statement covering granite trucks alone, is that right?

A. That is right.

Q. How much of your item of tolls and fines, which is shown as thirteen hundred twenty-four dollars and sixty-five cents, is fines?

A. I couldn't tell you that offhand. It is a small portion of it, I know.

Q. Are they overload fines?

A. On two instances it would be, I recall those.

[fol. 145] Q. Now, in your direct testimony you stated that if the application is granted it will make a more profit-

able operation for you because you will be getting a back haul of granite from the Vermont area, is that right?

A. Right.

Q. However, you won't be getting any back haul on truck deliveries in the State of Texas, will you?

A. Under the present operation we would, but under incorporation we would not.

Q. Do you now operate in the State of Texas?

A. No.

Q. You are not asking for any rights from Texas back to Milbank?

A. No.

Q. So that you won't have any back haul?

A. I can explain that the rates are higher in comparison going south than east.

Q. But you won't have any back haul from Texas?

A. No.

Q. And Arkansas and Oklahoma, the same thing?

A. That is right.

Q. How about West Virginia, Maryland, and District of Columbia?

A. No.

Q. What are you going to haul back from West Virginia?

A. Dead head to Berry, Vermont. We intend to dead head from there to Berry, Vermont, and pick up a load.

[fol. 146] Exam. Roberts: I think you should be more responsive to these questions.

By Mr. Cronon:

Q. Are you going to have a back haul directly from West Virginia to South Dakota?

A. No.

Q. The same thing is true of Maryland and the District of Columbia, is that right?

A. We will know we are not going to have a back haul.

Q. You spoke about having to discharge some of your drivers and you had difficulty in keeping good drivers. What do you mean by that?

A. I didn't testify that I had difficulty with keeping drivers.

Q. I got the impression that you said that your requirements of your drivers were so strict that you had difficulty keeping men on the pay roll, is that right?

A. No, I didn't testify that.

Q. Then, you have had no difficulty in keeping men on your pay roll?

A. I have had no difficulty, although I have disposed of drivers that wouldn't follow regulations.

Q. And what regulations didn't they follow?

A. Well, the main regulation was that they spent too long a time on lay-overs. That was a company regulation, our own.

Q. You mean that they would take more than the eight or ten hours off?

[fol. 147] A. No. There was lots of times when we leased to other motor carriers. If there was a load ready to go on Friday out of Chicago for Gateway Transportation or whoever we may be leasing to, possibly the driver would spend an extra day, and for that reason is the reason.

Q. You mean an extra day off the job?

A. That is right.

Q. How about these drivers violating the hours of service regulations?

A. We have had practically no trouble with them. We had to call a couple of guys to the point that they probably had put in twenty minutes overtime, and we watch that very, very close.

Q. When you say you had practically no trouble, how much trouble have you had with the drivers?

A. Well, there was only one instance where a driver had spent approximately twenty minutes extra time on loading, and he was to have completed his driving in bad weather conditions, and he got into this place and he wanted to continue unloading.

Q. Describe the type of trailers you use.

A. Well, the type of trailers we use are the flat-bed trailers with about twenty-two inch sides to prevent the granite from sliding off or shifting.

Q. Have you leased any of your equipment to other parties for the return haul from, say, New York or Pennsylvania?

A. Yes.

[fol. 148] Q. Do you intend, then, to so lease them in the future if this application is granted?

A. No, we don't intend to, because it has been very impractical.

Q. Assume that this application is granted, and you have delivered a truckload of granite down in Vermont and there is no shipment moving back from Vermont to the South Dakota area, would you lease that truck out to somebody else in order to make it a pay haul?

A. No, that truck would remain in Berry.

Mr. Cronon: That is all.

Exam. Roberts: Mr. Morken.

Redirect examination.

By Mr. Morken:

Q. If you will refer to page 4 of Exhibit 5, the profit and loss statement covering your granite trucks, now, as I understand it, that covers five tractors and five trailers and one straight job?

A. That is right.

Q. And under expenses, the second and third items, almost seven thousand dollars for parts and about eight-five hundred dollars for tires?

A. Right.

Q. In other words, over a thousand dollars a vehicle for parts and over a thousand dollars for tires, and are those the items that you were referring to with Mr. Coyne that are unduly and exceptionally large due to your maintenance program at the close of the year 1951?

[fol. 149] A. Yes.

Q. Now, you mentioned that your equipment was recently inspected by the Interstate Commerce Commission. Who inspected it?

A. Road checks, highway checks on the road.

Q. Did an ICC employee inspect it?

A. That is what the cards that they gave our drivers said, "State and ICC inspected", two of them were inspected in Pennsylvania and two of them in Ohio.

Q. What is the man's name who published those tariffs?

A. Charles Carr.

Q. Does he hold an official position with the state of South Dakota?

A. Yes, rate expert.

Q. For the South Dakota Commission?

A. South Dakota Commission.

Q. Following Mr. Cronon's question with regard to back haul, if you have a truck that leaves South Dakota to an eastern state such as New York or Pennsylvania, if that truck took a load from Vermont to Texas, and then traveled empty from Texas to Grant County, would you consider that a back haul?

A. Yes.

Q. Would it be more profitable, then, to run the trucks from New York or Pennsylvania back to South Dakota empty?

A. Much more.

[fol. 150] Q. Would the same thing apply as far as if you ran a truck from Vermont to Texas, one that is stationed in Vermont, and then you dead headed it up to Grant County to get a load back to Connecticut or New York, would you consider that a back haul?

A. Yes.

Q. And would it be a more profitable operation than running the truck from Texas back to Vermont empty?

A. Yes.

Q. And would the same thing be true as far as all the rest of these states that you are applying for, not only out of Grant County but out of Vermont?

A. Very true.

Mr. Morken: That is all.

Recross examination.

By Mr. Coyne:

Q. With respect to this back haul, Mr. Schaffer, on page 4 of Exhibit No. 7, it shows income of nineteen thousand seven hundred thirty-six dollars and forty-nine cents for back haul at the present time, and it also shows nine thousand three

hundred fifty-seven dollars and sixty-two cents for "Lease." Those are all back hauls, aren't they?

A. Just a moment, please. What page?

Q. Page 4.

A. That is the granite trucking operation. The lease trucks and the back haul are two different items. Leased trucks are trucks that we leased under our authority to [fol. 151] haul granite out of South Dakota in the spring of the year from about February until the 30th of May or Memorial Day to take care of the overrun, and that is money received—just a moment—no, that is money received for the freight that those leased trucks hauled, and as you go down the line, you will see where there was a six thousand dollar item, it says under "Lease," six thousand one hundred sixty-seven dollars and twenty-four cents paid out to leased trucks for that labor for that work.

Q. You still did have back hauls of nineteen thousand seven hundred some dollars, correct?

A. That is correct.

Q. As compared to what would appear to be the outgoing haul of forty-nine thousand eight hundred some dollars, correct?

A. That is right.

Q. So percentage-wise you were back hauling somewhere about forty percent of the time?

A. A little less than forty percent.

Q. And that included your overall operation which in some instances only goes down to Illinois, Ohio, Indiana, and the like, is that correct?

A. That is right.

Q. And these back hauls of nineteen thousand occurred on such times as your equipment reached out to the east end of Ohio and into Pennsylvania and New York primarily?

A. They also occurred when they covered the states of [fol. 152] Indiana, Ohio, and Illinois.

Q. And those in those states would be back hauls of steel, however?

A. That is right.

Q. Which would only be a back haul for part of the way, correct?

A. What was that question?

Q. Which would only be a part-way back haul in some instances?

A. Well, no, if we only went into Illinois and Indiana, and you picked up a load of steel, I would say that would be almost a complete back haul, as you wouldn't be dead heading too far.

Exam. Roberts: Under what authority would that steel be transported?

The Witness: Under leasing our equipment to bona fide carriers that do have operating rights, such as Gateway Transportation, Moore Transportation, and Glendenning.

By Mr. Coyne:

Q. And you would have to share the profit on that leasing to such carriers?

A. That is right, common practice.

Q. Which would account for a reduction in revenue on back haul?

A. That is right.

Q. So that actually your trucks were probably busy on back hauls more than forty percent of the time?

A. No. This figure was the amount of money that we collected from those transportation companies.

Q. That is what you collected from them?

[fol. 153] A. From the transportation companies.

Q. Now, getting down to the expenses, the tires and parts that you put on at the end of the year to gain in income tax-wise, they were maintenance, weren't they?

A. Right.

Q. They were required or they wouldn't be done, is that correct?

A. Well, to a certain extent, yes.

Q. If you didn't do them, then you would have had to do them a few months later?

A. Yes.

Q. And from year to year they would be reflected in the middle of the year rather than at the end of the year?

A. That is right,

Mr. Coyne: That is all.

Recross examination.

By Mr. Cronon:

Q. Considering your present granite trucking operations only, what percentage of your movement back into South Dakota is empty?

A. Well, it would be about sixty percent.

Q. Empty?

A. Yes.

Further redirect examination.

By Mr. Morken:

Q. You understand, Mr. Schaffer, that if the proposed rules become effective you won't be able to lease these?

A. That is right.

[fol. 154] Q. And when and if that comes about, your net increase will be——

Mr. Cronon: That is objected to.

Exam. Roberts: Mr. Morken, I think you are taking unfair advantage here. We said we would only go around twice.

You may be excused.

(Witness excused.)

Exam. Roberts: We will recess until 2:30.

(Whereupon, at 1 p. m., a recess was taken until 2:30 p. m. of the same day.)

[fol. 155] AFTERNOON SESSION

Exam. Roberts: Come to order, gentlemen.

Mr. Morken: I will call Mr. McBride.

RICHARD T. MCBRIDE was sworn and testified as follows:

Direct examination.

By Mr. Morken:

Q. Please state your name?

A. Richard T. McBride.

Q. That is M-c-B-r-i-d-e?
A. That is right.
Q. Where do you live?
A. Montpellier, Vermont.
Q. By whom are you employed?
A. Barre Granite Association.
Q. What is the Barre Granite Association?
A. It is a trade association consisting of seventy-seven member companies all located in the Berre, Vermont, district. Five of the member companies are carriers. Five do custom sawing or polishing only, and the other sixty-seven are manufacturing finished monuments.
Q. This association, to what extent does it represent these manufacturers, and as far as this hearing is concerning involving proposed transportation to and from Vermont, does your association represent its members in traffic and shipping matters?
A. Yes.
[fol. 156] Q. And to what extent?
A. You mean that to shipments or——
Q. Yes.
A. Well, one of the departments of the association is a traffic department, and shipments of granite by all our members are consolidated into pool cars and shipped out of the district to various points around the country.
Q. Do your members make individual shipments on their own behalf?
A. Yes.
Q. And then they make some through pool cars that——
A. Under the name of the Berre Guild Consolidated Service and the name of the traffic department is the Berry Guild Consolidation Service.
Q. What is your position with the Berre Association?
A. I am the field representative.
Q. What do your duties involve?
A. Generally they are promoting the interests of the entire Berre district by calling on retail monument dealers throughout the country in an attempt to promote the sale of Berre monuments. You might call it a sort of a general good-will trouble-shooter representative?
Q. Do you sell granite?

A. No.

Q. You travel, though, out of Vermont?

A. Yes.

[fol. 157] Q. And do you call on witnesses such as Mr. Osborne, who testified as the first witness today—were you here when he testified?

A. Yes.

Q. Do you call on witnesses such as he?

A. Yes, retail monument dealers.

Q. When you call on a witness such as Mr. Osborne on behalf of the association, is part of your contact dealing with his transportation to and from the members of your association?

A. Yes.

Q. Does the territory in which you operate cover this middle-western part of the United States or in the part that is involved in this application?

A. Not all of the part that is involved in the application, but a good portion of it.

Q. And if we take a state like Iowa, do you call on the individual monument dealers throughout Iowa, as an example?

A. Yes, I would say that I see most of the dealers in the State of Iowa at least once a year.

Q. Do you know roughly how many dealers there are in a state like Iowa?

A. Well, I would be guessing, but I would say probably fifty-five or sixty in that area.

Q. Do you call on all of them on behalf of your association or only those that deal with your members of your association?

[fol. 158] A. Well, I call on most of them. I am trying to think of a word to describe what I am going to say. The fact that they would or would not deal with members of my association wouldn't deter me from calling on them. It is the fact that they are in the retail monument business and are potential members of my association.

Q. Again using Iowa, and if it is not typical, you tell me so, do you know the approximate number or the percentage of the, say, fifty-five monument dealers in a

state like Iowa that the members of your association ship to?

A. Well, again, if there are fifty-five or sixty, and I think that is about right, I would say that probably at least fifty of them would use some Barre granite.

Exam. Roberts: What other states in this area do you have dealers?

The Witness: I might answer that by saying that the members of our association ship Barre granite into every state but Nevada. We ship Barre granite into all states in this shaded area.

By Mr. Morken:

Q. Do you have any records with you of the number of cars or shipments or tonnage that were shipped by your association, that is, by the Barre Guild to, say, the states that are involved here or part of the states?

A. Well, I would have to answer you first by saying that you understand that in addition to the pool car serv- [fol. 159] ice which is rendered by the association, the members also ship less than carloads themselves and also ship carloads by themselves. Last year, or rather from the period, December 1st, 1950, to December 1st, 1951, our Barre Guild Consolidation Service shipped two hundred sixty-eight cars of granite to a little over nine hundred dealers in twenty-five states. That represented seven thousand four hundred seventy-two tons of granite, or almost fifteen million pounds of the two hundred and sixty-eight cars, one hundred and fifty-six of them went into the shaded area of the map.

Exam. Roberts: You indicated in answer to my question that you shipped to all these states except Nevada?

The Witness: It is shipped and sold but not necessarily by the Barre Granite.

Exam. Roberts: I understand that.

The Witness: We had none.

Exam. Roberts: We were speaking of these shaded states, your members shipped to all of those states?

The Witness: That is right.

By Mr. Morken:

Q. And last year?

A. One hundred fifty-six cars went into the shaded area on the map.

Q. And those cars were only the pool consolidated cars shipped by the Barre Guild, which is your association?

A. That is right.

[fol. 160] Q. Going back again to Mr. Osborne, would he be considered a typical customer of your members, or is he unique or different with his problems on transportation?

A. No, he is not unique. He would be more typical.

Q. When you call on the various monument dealers, do they register complaints with you on the quality or the type of goods as well as, say, transportation, damage or claims or anything of that nature?

A. Yes, they do.

Q. Are you using any truck service at the present time from Vermont to the shaded area, the states in the shaded area on Exhibit 5?

Mr. Coyne: I object to that until it is established that this witness ships granite. I have him noted here for stating that he does not sell granite.

Exam. Roberts: I think he should confine his answer to whether or not the Association hires motor carriers for shipments.

By Mr. Morken:

Q. Does your association, the Barre Guild, use any motor, or, first, do you use any motor carrier service at all on your pool shipments?

Mr. Coyne: Just a moment.

Exam. Roberts: Let's go back to the origin. I think we ought to find out whether the Guild actually does any hiring of motor carriers for the association members.

[fol. 161] Mr. Morken: All right.

Mr. Coyne: Yes, he is the Barre Granite Association, isn't he?

By Mr. Morken:

Q. Excuse me, and you correct me if I am not correct, but the Guild is a trade name?

A. That is right, the words "Barre Guild" and "Barre Granite Association" are used interchangeably.

Exam. Roberts: This Barre Guild Consolidated Service, does that use any motor carriers in the selection of transportation?

The Witness: No, only locally, and at the point of destination to haul from the rail head to the dealer's place of business and to pick up at the manufacturer's plant at Barre and bring it to the Barre Consolidation, it is a rail operation.

Exam. Roberts: It consolidates local shipments for movement out of Barre by rail?

The Witness: That is right.

By Mr. Morken:

Q. And it is all rail to the shaded states involved in this application on Exhibit 5?

A. Yes, the states in that shaded area to which we send cars are sent by rail.

Q. Do I understand that you do not use truck from, say, New York or Pennsylvania or some other point?

A. All those shipments, the shipments to the east coast are not handled by the Barre Guild Consolidation Service I might add that trucks are used in the east, but not by [fol. 162] the Consolidation Service, because we don't operate in the east with two exceptions.

Q. Now, when you call on these monument dealers, do they ask you to arrange truck transportation for them?

Mr. Coyle: That is objected to as hearsay.

Exam. Roberts: Objection overruled.

A. On many occasions I have had retail monument dealers state to me that they wished or hoped that truck service was available from the Vermont district to their place of business.

By Mr. Morken:

Q. And why is that?

Mr. Coyne: I object for the same reason, that it is hearsay, and I can't cross-examine the people who made the statement.

Exam. Roberts: Rephrase your question, Mr. Morken.

By Mr. Morken:

Q. Did they state the reasons to you as to why they wanted you to arrange for this truck service?

A. Yes.

Q. And what were they?

Mr. Coyne: Same objection.

Mr. Cronon: I join in that objection.

Exam. Roberts: Objection overruled.

A. They stated, and I am talking particularly about dealers in areas where our Consolidation Service doesn't operate. For example, we operate into eleven cities. The Consolidation Service has been satisfactory in most instances. I am talking about retail monument dealers who [fol. 163] are not located in those principal cities, and their reasons are that the Consolidation Service is inadequate for their needs. If they use the Consolidation Service and their granite goes into a break-bulk city and the delay involved in them either going to get it or it going on less than carload to them, it is so great that the Consolidation Service actually is of no benefit to them.

Exam. Roberts: Do you act as a broker for these members of your Guild?

The Witness: Well, I don't think the word is "broker." It is simply a department of the association.

Exam. Roberts: It is a clearing house?

The Witness: We are not a freight forwarder. This department of our association simply collects the freight from our member companies in the district.

Exam. Roberts: That is merely a local service?

The Witness: That is right, for our own members only.

By Mr. Morken:

Q. You mentioned that there were break-bulk points in eleven cities. Are any of those cities in this shaded area on Exhibit 5?

A. Yes, Chicago is, Kansas City is, St. Louis is, Springfield, Illinois and Davenport, Iowa, and that is all I can think of right now.

Q. Do you know Mr. Walther Freeman of Nebraska?

A. Yes, I do.

[fol. 164] Q. Is he situated where he could use your pool car shipments?

A. Well, I am actually not that familiar with Mr. Freeman's operations. I can say——

Exam. Roberts: Wait a moment.

By Mr. Morken:

Q. Do you have any example of a monument dealer or a customer, say, outside of Chicago or St. Louis that is so situated where they cannot use that pool car service?

A. Well, I would say that, for example, in Iowa, in Des Moines, Iowa, we have found in the past year's operation that dealers in that area have not used it, and the reason we are told and I am told by them in meeting with them that the area doesn't seem to have enough Barre granite at one time being purchased by monument dealers to make a pool car into that district.

Q. If the Barre Association had available a service such as is proposed by Mr. Schaffer, would they use it?

A. Well, I cannot say that the Barre Granite Association would use it. I would say that our members——

Mr. Coyne: I object to stating in speculation as to what others would do. He is speaking for the Barre Granite Association and if they could not use it——

Exam. Roberts: You should confine your answer to the Barre Granite Association.

By Mr. Morken:

Q. Let me ask you this question. Will you name two, three or four of the larger, say, manufacturing members of your association, the names of the companies?

[fol. 165] A. Rock of Ages Corporation, Jones Brothers Company, Johnson and Gustafson, Buttura and Sons, and Beck and Beck.

Exam. Roberts: Where are they located?

The Witness: All in Barre, with the exception of Rock of Ages, whose finishing plant is in Northfield, Vermont.

By Mr. Morken:

Q. Did you discuss your appearance here today and this testimony with any of those individual companies?

A. Yes, I discussed it with representatives of the Rock of Ages Corporation, the representative of Jones Brothers Company, and with Mr. French, the general manager of the Barre Granite Association.

Q. Did those companies delegate to you the responsibility to appear in this proceeding on their behalf and represent their interests as shippers of Granite?

A. Yes.

Q. Now, will the Jones Brothers or Rock of Ages people use the proposed service?

Mr. Coyne: I object to that as hearsay. I have no opportunity to cross-examine the man from Jones Brothers.

Exam. Roberts: Objection sustained.

By Mr. Morken:

Q. Have you ever heard prior to today or within the last, say, yesterday of Mr. Dingman who runs the Granite City Transfer Company, a granite hauler?

A. No.

Q. Has your association or its members ever been so-
[fol. 166] licited by Mr. Dingman who hauls granite?

Mr. Coyne: I object to the form of the question. He may answer as far as the Association, but I object to the specific members.

Exam. Roberts: Objection sustained.

By Mr. Morken:

Q. As far as your association is concerned, have you ever been solicited by Mr. Dingman?

A. No.

Q. Did you ever hear of a Michael Benz carrier having authority to transport granite from Vermont out into this area?

A. No.

Q. If Mr. Benz or Mr. Dingman had transported granite from the quarry or Montpelier, Vermont, is that service of such that it would be called to your attention?

A. Yes.

Mr. Coyne: Has he answered the question?

The Witness: Yes.

By Mr. Morken:

Q. Mr. McBride, did any of the individuals manufacturing and shippers of granite authorize you as their agent to appear here in their behalf at this proceeding?

A. May I have the question repeated, please?

(Question read.)

A. Yes.

By Mr. Morken:

Q. And what companies are those?

A. Specifically Rock of Ages and Jones Brothers.

[fol. 167] Q. Now, as an agent for Rock of Ages, will that company use the proposed service?

Mr. Coyne: That is objected to on the same basis as I did before, that is, authorizations through oral conversations with these people, and I don't know what their reason may be.

Mr. Cronon: I join in Mr. Coyne's objection, as you can't establish the agency between Rock of Ages by the testimony of this witness.

Exam. Roberts: I will sustain the objection.

By Mr. Morken:

Q. Will you describe the size or the area for the sources of granite in Vermont by counties or towns? If a map would help you, I have a map. Would you like to see a map?

A. I don't need a map. In the Barre district today there are five operating quarries. The five of them are located either in Graniteville or Websterville, two towns both about three miles outside of Barre. This is in Washington County. With the exception of one finishing plant, all of the other members of the association are located in Washington County. The one plant that isn't is in Williamstown in Orange County.

Q. Which is the adjoining countó to Washington County?

A. Yes. The members are located in Barre, Montpelier, Waterbery, Northfield, and East Barre, those are the member companies of the association.

Q. Without referring specifically to a map, are those points all within a ten-mile area or a five-mile area or how [fol. 168] big an area are we talking about?

A. Well, I would say that probably sixty-five of the manufacturing plants are located within ten miles of the quarries, and the quarries and the majority of the plants are all located within a ten-mile area.

Q. All in Washington and Orange Counties?

A. That is right.

Q. Do you know what the existing rail service is as far as time of delivery from Barre, Vermont, to destinations in the middlewest is concerned?

Mr. Cronon: That is objected to as too general a question.

By Mr. Morken:

Q. Do you know what it is to some representative points, and do you know the name of the point, approximately?

Q. Well, I would say—are you speaking of less than carload or the Consolidation Service?

Q. Both.

A. The carload service into points in the shaded area, I would say, runs about from the best service, which is probably Chicago, between six and eleven days, but the less carload service to dealers with whom I have discussed the matter.

By Mr. Cronon:

Q. Do you know of your own knowledge, Mr. McBride, or is this something that the dealers told you?

A. This is something that the dealers told me.

Mr. Cronon: I object to that as hearsay.

[fol. 169] Exam. Roberts: Objection sustained.

By Mr. Morken:

Q. Do you know if the L.C.L. service is substantially longer than the carload service that you get?

Mr. Cronon: Same objection.

Exam. Roberts: He can answer.

A. Simply from being told by dealers.

Mr. Cronon: Objection.

Exam. Roberts: Objection sustained.

By Mr. Morken:

Q. Is there a need for speed on the movement of small less than carload shipments from Barre, Vermont, to points in the middlewest?

A. Yes.

Mr. Coyne: That is objected to as being incompetent of this witness.

Exam. Roberts: The witness has answered the question.

By Mr. Morken:

Q. What is that need for speed?

A. The fact that in many cases monuments are sold, as Mr. Osborne stated, people seem to take a long time to buy them, and once they buy them, they want them in a hurry, and the only service that has been available out of Barre is the Consolidation Service into only eleven cities. The speed is important because in many cases these retail monument dealers who do not have specific types and sizes of Barre granite monuments in their stock will switch their customers to other granites.

Q. Does the Barre area provide—we have covered the [fol. 170] different granites—a different type of monument work other than granite areas?

A. Yes. Baree has always been known historically as more or less the memorial art center of the world. Barre has also been noted for the very fine skilled craftsmen and artisans who live and work in that district. Barre's reputation has been built on finely carved and sculptured memorials as compared with markers or something which would have little or no sentimentation or fine craftsmanship on it.

Q. Is your position on breakage similar to that of previous witnesses, such as Mr. Stengel and Mr. Osborne? Did you hear them testify about the difficulty of breakage?

A. The same is true about Barre granite. That is subject to chipping if handled roughly.

Mr. Morken: You may examine.

Mr. Coyne: I have no questions.

Exam. Roberts: Mr. Cronon?

Cross-examination.

By Mr. Cronon:

Q. Mr. McBride, are the quarries that you speak of around Barre served by some of the Vermont railways?

A. Yes, they are served, as the Barre and Chelsea Railroad runs from Baree to the quarries.

Q. How about the Ruthland Railway, does that serve any of the quarries?

A. No, not that I know of.

[fol. 171] Q. However, such railroads as the Ruthland and Central Vermont interchange with the short line you speak of, don't they?

A. Yes.

Q. Now, that Barre and Chelsea Railroad, their main business is hauling granite?

A. That is right.

Q. And that probably constitutes a good ninety to ninety-five percent of their revenue, wouldn't you say?

A. I don't know.

Q. A substantial part of it, though?

A. A substantial part.

Mr. Cronon: I think that is all.

Exam. Roberts: Redirect examination?

Redirect examination.

By Mr. Morken:

Q. With regard to the railroad hauling, if this authority is granted, does your association plan to discontinue the use of rail service?

A. No.

Q. Would the proposed service be used as an adjunct in addition to the existing rail service?

A. I believe so.

Mr. Morken: That is all.

Exam. Roberts: You may be excused.

(Witness excused.)

Exam. Roberts: Call the next witness.

[fol. 172] Mr. Morken: I will call Mr. MacCarty.

Howard J. MacCarty was sworn and testified as follows:

Direct examination.

By Mr. Hetland:

Q. Will you state your full name, please?

A. Howard J. MacCarty.

Q. What trade name or company name do you use?

A. MacCarty Memorials.

Q. Where is your business located?

A. Hutchinson, Kansas.

Q. How long have you been in the business?

A. My father preceded me in the work. This is my twenty-fifth year.

Q. Now, will you describe generally what type of business you are engaged in?

A. The sale of private and public memorials.

Q. On a retail level?

A. That is correct.

Q. What type of granite do you use in your business?

A. Barre, Vermont, granite, Wisconsin granite, Dakota granite, and St. Cloud granite principally.

Q. Now, are you a fabricator or processor anything like that?

A. In a very small way.

Q. You buy primarily finished pieces from the manufacturers?

A. That is correct.

Q. Now, are you familiar with the application of Mr. [fol. 173] Schaffer and the proposed operation?

A. I presume so.

Q. And you know that Kansas——

Exam. Roberts: Would you put those in a more interlocutory form?

By Mr. Hetland:

Q. You know that Kansas is one of the states that Mr. Schaffer is proposing to ship granite from Vermont?

A. I do.

Q. Will you state what your present transportation facilities from Vermont to Hutchinson, Kansas, are?

A. From Barre, Vermont, our shipments usually originate, I think it is, out of Barre, Montpelier, and Wells River, and then either Canadian National and New York Central into Ohio. It is the Santa Fe or Rock Island the rest of the way, and that is true with local shipments, with consolidated carloads the routing into Kansas City is not left to me, and the car has its bulk broken, as we call it, at Kansas City, and then we use either a common carrier or rail line from Kansas City into Hutchinson.

Exam. Roberts: Motor common carrier?

The Witness: That is right.

By Mr. Hetland:

Q. How far is Kansas City from Hutchinson?

A. Road miles about two hundred and thirty.

Q. In other words, there is one additional from Kansas City in your pool car shipments?

A. That is correct.

[fol. 174] Q. Now, approximately how many pounds of granite do you purchase a year?

A. From Barre?

Q. From Barre.

A. I can't confine myself to facts on this. I would hazard a guess of approximately forty to sixty thousand pounds.

Q. Forty to sixty thousand pounds a year?

A. Yes.

Q. Now, how many shipments would that be a month, break it down pool car and L. C. L.?

A. Well, I would say we would have approximately six local shipments a year.

Q. That is L. C. L.?

A. That is correct, and we would engage in approximately four pool car shipments a year.

Q. What poundage would you generally have on an L. C. L. shipment?

A. Well, nearly the minimum, as little as possible. That's too difficult. I would hazard a guess of about three thousand pounds, not more than that.

Q. Now, is there any motor carrier transportation available from Vermont to Hutchinson, Kansas?

A. Not to my knowledge.

Q. Have you ever heard of Granite City Transfer or Mr. Dingman prior to this morning?

[fol. 175] A. Not to my recollection.

Q. You have not been solicited by Granite City Transfer or Mr. Dingman?

A. Not to my recollection.

Q. If motor carrier service had been available prior to Mr. Schaffer's service, which he is proposing to offer here, would you have used such service?

A. Not necessarily.

Q. You are interested in obtaining motor carrier service from Vermont to Kansas?

A. If it is efficient and responsible.

Q. Why are you interested in obtaining motor carrier service?

A. It is impossible to my way of thinking to crate such weights as we have in such a manner that it is positive

protection for its contents. Therefore, the less handling or transfers, it is distinctly to our advantage.

Q. What has been your experience on breakage with rail transportation?

A. In previous years we have had a great deal of trouble. Of recent years we have had a few claims, but I don't think that our claims have been an undue amount in recent years, particularly because of the cooperation of our shippers at Barre in using extreme care in crating.

Exam. Roberts: Must all rail shipments be crated?

The Witness: That is correct, sir, unless they are just slabs.

[fol. 176] Exam. Roberts: How about in the use of motor carrier service, would it be necessary to crate those shipments?

The Witness: Partially, yes, sir.

By Mr. Hetland:

Q. Would you be able to cut down particularly the crating necessary with motor vehicle transportation?

A. I would think so.

Q. And you heard the testimony this morning with regard to the characteristics of granite, that it is subject to breakage if handled roughly or if the crates are broken in transit?

A. Yes, sir.

Q. That is definitely a characteristic of granite?

A. Yes.

Q. How about the spoilage and staining by grease and chemicals, what effect do they have on granite?

A. That is true.

Exam. Roberts: What is true?

By Mr. Hetland:

Q. I asked you what effect it might have. Is there any effect that grease and oil and other chemicals have upon granite?

A. Yes.

Q. What effect is that?

Mr. Cronon: Just a minute.

There isn't any evidence in this record to date that by virtue of rail or motor carrier any oil was applied to granite shipments, so I object to that question as incompetent.

[fol. 177] Exam. Roberts: I think counsel ought to clarify that, whether he is comparing this service with rail or what.

Mr. Hetland: Maybe I can lay a bit of foundation.

By Mr. Hetland:

Q. In your L. C. L. shipments have you ever experienced any spoilage on your Barre granite?

A. No, of any appreciable amount.

Q. Have you experienced any?

A. Negligible.

Q. On your dry freight?

A. I have to a little greater extent.

Q. What is that stain, how does it appear, what effect does it have on the granite?

A. Granite will absorb petroleum content off of any container that becomes loose and quite nearly with our heavy-weight shipments are always on the bottom, as they should be, of any car or means of transportation, so the lighter objects are nearly piled on top of them, so any breakage of some petroleum product will cause a definite mark, stain, which is extremely difficult at times to remove.

Q. Now, it is therefore advantageous to you to have a shipment composed completely of granite, as you get in your present L. C. L. shipments, and not a mixed car?

A. Yes.

Q. What has been your experience on the time for delivery from Barre, Vermont, to Hutchinson, Kansas, via rail?

[fol. 178] A. Now, you are speaking of local shipments or pool car shipments?

Q. Let's take the L. C. L. first, and then the pool cars next.

A. Actually there is very little difference in the length of time that is required. I would say normally or usually

from fourteen to approximately twenty-one days, and if the gentlemen will permit, I would like to qualify my statement regarding very little difference in time between the local shipments and consolidated car shipments. The difference in time being split, the time of arrival, is due to the fact that three or four days' time is usually lost, for instance, with us at Kansas City in breaking this bulk of this car that comes into Kansas City, and then rerouting the shipment on to Hutchinson.

Q. Do you have any of your freight bills with you?

A. A few, yes, sir.

Q. Would you look at those freight bills, refer to 1-E, and give the exact dates of the shipment, where it originated, where it was shipped, and the time that it arrived?

A. Here is one. This is in a pool car to Kansas City from the Jones Brothers Company of Barre for fifty-four hundred pounds, and it was shipped to me according to my invoice April 11, arrived in Hutchinson, April 27. Here is another one.

Mr. Cronon: Just one minute.

I understood that this testimony was to be from freight bills, but you are testfying from invoices.

[fol. 179] The Witness: No, sir, here are my bills.

Mr. Cronon: You said invoice.

The Witness: Here is the invoice.

Exam. Roberts: You can bring that out on cross-examination.

A. Here is an invoice dated July 13. The freight bill shows that it was shipped July 13, and it arrived in Hutchinson, August the 20th, this was last year, eleven thousand two hundred seventy pounds.

By Mr. Hetland:

Q. Are those examples typical of your L. C. L. shipments?

A. This last one is very unusual, much longer than normal.

Q. Now, you are located in Hutchinson, Kansas. What type of an area do you serve, about what radia outside of Hutchinson, Kansas?

A. I think we could flatter ourselves by saying that we cover the southwest quarter of Kansas.

Q. You would then deliver monuments order from you to points and places one hundred miles distant from Hutchinson?

A. Oh, yes. We have had two trips this year to Garden City, which is one hundred eighty-five miles from Hutchinson each way.

Exam. Roberts: These trips are made in your own vehicles?

The Witness: That is true.

By Mr. Hetland:

Q. Now, when you are using your present rail service, how is the time for deliveries, is it certain or uncertain as to when those pieces of granite from Barre, Vermont, [fol. 180] will arrive in Hutchinson, Kansas?

A. I am sorry, I don't understand your question.

Q. Are you able to predict with any degree of certainty when granite shipped from Vermont will arrive in Hutchinson, Kansas?

A. Within approximately ten days, I think, on the average.

Q. Assuming that you have two monuments going out one hundred miles from Hutchinson and assume that both of the monuments were shipped a day apart, would you expect to carry both of those monuments out from Hutchinson to one hundred miles out in the same truck on the same day, your own truck?

A. Yes, sir.

Q. Assuming now that you have a variance, as you have testified, of seven days in delivery, will you make a burden upon your business practice, increase your operational difficulties?

Mr. Coyne: May it please the examiner, I object to the leading and suggestive manner of the counsel here.

Exam. Roberts: I have cautioned counsel once before about the leading nature of the questioning. I think he can rephrase the question.

Mr. Hetland: I will rephrase the question.

By Mr. Hetland:

Q. Is it necessary to cut down on your own private carriage of memorials to points and places outside of Hutchinson, Kansas?

A. At certain times of the year.

Q. Will you explain that, please?

[fol. 181] A. In the spring of the year we are rushed, and it is not only a matter of time, but a matter of savings to make two or three more deliveries on one trip. It is quite necessary to have these shipments synchronize themselves into our place of business in order to expedite delivery.

Q. In other words, it is very important to be able to predict the exact time of delivery?

Mr. Cronon: That is objected to as a leading question.

Exam. Roberts: Will you rephrase the question?

By Mr. Hetland:

Q. Is the time of delivery important in the monument business?

A. Yes.

Q. Do you consider speed an essential element in the transportation of granite from Vermont?

A. Yes.

Exam. Roberts: These shipments that you receive from Barre, Vermont, don't you perform some sort of work on them in your shop before you take them out?

The Witness: Sometimes we do and sometimes we don't.

Exam. Roberts: As a general rule, isn't it an unfinished product that comes in there, you don't do any lettering?

The Witness: We do some.

Exam. Roberts: What percentage would be finished and what in the rough?

The Witness: I would ~~say~~ seventy-five per cent is finished.

[fol. 182] Exam. Roberts: And it is ready for direct movement to the customer?

The Witness: That is right.

Exam. Roberts: Proceed.

By Mr. Hetland:

Q. Is your business, your monument business, a periodic type of business, such as Mr. Osborne testified to?

A. Yes.

Q. When is one of your peak periods?

A. From March, about March 15, to approximately June 1st.

Q. Covering the Memorial rush?

A. That is right.

Q. When is the cut off point for taking orders for the Memorial Day rush for Barre granite?

A. If the work is small and simple in fabrication, I would say about April 1st.

Q. If you had motor carrier transportation available, could you extend that period closer to May 30?

A. Yes, sir.

Q. By how much time?

A. Depends on the efficiency of the carrier, but if it is as efficient as this gentleman described, I would say ten days to two weeks, more or less.

Q. You purchase granite from the Jones Brothers in Barre, Vermont?

A. Yes, sir.

[fol. 183] Q. Have you ever requested motor transportation from the Jones Brothers?

A. No, sir.

Q. Why?

A. I didn't think there was any.

Q. Do you want motor transportation service from Barre?

A. If it is good service.

Mr. Hetland: Your witness.

Cross-examination.

By Mr. Coyne:

Q. Mr. MacCarty, do you get granite from St. Cloud, Minnesota, at the present time?

A. Yes, sir.

Q. And does some of that come in by Granite City Transfer?

A. No, sir.

Q. You have never requested motor truck?

A. I didn't know it was available.

Exam. Roberts: Answer the question, please.

A. No, sir, I haven't.

By Mr. Coyne:

Q. How much research or survey did you make to determine what motor carriers services were available?

A. None.

Q. From Barre.

A. You are asking me—repeat your question.

Q. How much, if any, research or survey did you do to determine the existing motor carriers facilities from Barre, Vermont?

[fol. 184] A. I have talked with the personnel and various times they have told me there wasn't any existing facilities other than rail.

Q. You made no inquiry other than that?

A. No.

Q. You made no inquiry to inquire about it at your local I. C. C. office?

A. No.

Q. How did you know about this hearing today, then?

A. Mr. Schaffer about a year ago asked me if I would care to ship some of my granite by way of his means of transportation, and I hesitated because I didn't know anything about the qualifications of any of the trucking lines.

Q. He came down to your place of business and solicited your support for this application?

A. He called me.

Q. You pointed out to him that you got the equivalent of one carload a year from Barre?

A. No.

Q. That is actually what you get right now?

A. I would say so, approximately.

Q. And in your discussion with him did you point out

that ordinarily your stones are received in quantities ranging three thousand pounds or less?

A. I don't recall that I did.

Q. He didn't go into any inquiry about that at all?

[fol. 185] A. About the tonnage, not to my recollection.

Q. Did he point out to you that if you had a request to go and get one or two or three stones from Barree that he would take a truck and drive up to Barre and bring them down from Barre and bring them down to you personally?

A. No, I don't believe so.

Q. Has he told you at all how he is going to serve you other than what you have heard on the witness stand?

A. Yes.

Q. And is that service that he is going to perform for you going to be in conjunction with split delivery loads with other retail dealers like you?

A. I don't know.

Q. Well, then, what did he tell you, how did he say he was going to serve you?

A. He told me that he could assure me of not more than eight to nine-day service into Hutchinson.

Q. Did he say that would be contingent upon anybody else having some come into that area?

A. I don't recall that.

Q. He didn't discuss the quantity that you wanted to ship with him?

A. I don't recall that.

Q. Are there other dealers around Kansas that you can make up truckloads with?

[fol. 186] A. I think so.

Q. And if this authority would be granted, I presume you would undertake to do that?

A. That is Mr. Schaffer's business.

Q. In other words, Mr. Schaffer is going to have to solicit or work out the pool or the split loads among the other dealers so that he can perform the service for you?

A. I would assume something of the kind.

Exam. Roberts: Would you have any need for full truckload service?

The Witness: Rarely, personally.

By Mr. Coyne:

Q. Now, if it should develop that you and, say, two or three other dealers who might be your friends or business associates down in Kansas had need for a truckload of Barre granite and were able to get that granite from the producers in Vermont, would you have any objection to requesting Granite City Transfer to perform that service for you?

A. I would ask only the same requirement of them that I would of Mr. Schaffer. I would want to be assure of their efficiency and responsibility.

Q. If the Interstate Commerce Commission has, as a result of a public hearing in the past, found Mr. Dingman doing business as Granite City Transfer a fit and reliable carrier and has authorized him to perform that transportation, would you then be willing to request for a try with his services?

[fol. 187] A. If Mr. Schaffer hasn't shown initiative in this, I think, yes.

Q. Well, if this application is denied to Mr. Schaffer, are you willing to use Mr. Dingman's service?

A. If it is efficient and responsible.

Q. Then, can we say that as far as your actual transportation needs are concerned, you would use Mr. Dingman if after usage you determine that he is a fit and proper reliable carrier?

A. To some extent, yes, sir.

Q. You have no past experience to make any statement today that Mr. Dingman's service would not be adequate for your business, have you?

A. No.

Q. And it is not your intention here today to tell the Examiner or the Interstate Commerce Commission that Mr. Dingman and the Granite City Transfer as an authorized carrier are not adequate to perform this service?

A. I know nothing of their background.

Mr. Coyne: That is all.

Exam. Roberts: Mr. Cronon.

Cross-examination.

By Mr. Cronon:

Q. Mr. MacCarty, do you receive any carload shipments of granite via rail from Barre?

A. No, I don't like to take time. I would like to qualify that since so much of our work is finished at the plants, [fol. 188] there is no occasion for us to hold up the carloads.

Exam. Roberts: Which plants, the Barre plants?

The Witness: That is correct, sir.

By Mr. Cronon:

Q. So that all of your shipments are less than carload by rail?

A. Or the consolidated car, of course.

Q. Now, you said something about fourteen days by rail from Barre to Hutchinson?

A. Yes.

Q. Do you get some of your shipments in less than fourteen days?

A. You are asking me to hazard a guess, and I will try to be fair about it. I would say that approximately, I can't recall any that have come in in ten days, but I think I am pretty safe in saying that most of them would run fourteen days or more.

Q. Some of them might run between eleven and fourteen, perhaps?

A. It would be very much in the minority.

Q. Your competitors down there in southwestern Kansas also receive their shipments by rail, I suppose, don't they?

A. I assume so.

Q. So that the fact that there is no motor carrier service rendered no competitive advantage to them or to you, you are all on the same basis?

A. No. We are an older company than any of the others. [fol. 189] We used to have a branch at Garden City, so we do a great deal of work there. So in order to be

competitive with those shops who are in the local vicinity we must be able to give comparative service to what they can give, even though we are operating at a distance.

Q. But if they get their granite from Barre, it takes them just as long as you?

A. Yes.

Q. So that the only party who has to wait fourteen days for their headstone is the family who is buying the product from you, isn't that right?

A. Yes, sir.

Mr. Cronon: That is all.

Exam. Roberts: Let's proceed.

Redirect examination.

By Mr. Hetland:

Q. Have you ever been solicited since December 1st, 1951, by Granite City Transfer?

A. No, sir.

Q. Did you consider yourself a typical small monument dealer in Kansas?

A. Yes.

Q. Your situation would be representative of other small dealers in the state?

A. Yes, sir.

Q. Assuming Mr. Schaffer's application is granted, would [fol. 190] you be willing to accept shipments on a split load basis whereby Mr. Schaffer would make deliveries in, say, Illinois, Missouri, and Kansas in bringing an amount of granite to you?

A. If his service was careful and responsible, yes, you bet.

Q. Would you consider it to be a business advantage to have smaller, more frequent shipments of granite from Barre, Vermont, to Hutchinson, Kansas?

Mr. Coyne: I object to the suggesting and leading form.

Exam. Roberts: Objection sustained.

By Mr. Hetland:

Q. Under the present rail transportation facilities, how large an inventory must you carry?

Mr. Cronon: That is objected to as too general, how large an inventory of what?

Mr. Hetland: Of granite from Barre, Vermont.

Exam. Roberts: Objection overruled.

A. That would vary. This time of the year we are pretty well cleaned down, as I call it.

By Mr. Hetland:

Q. Would the proposed service permit you to reduce the inventory of Barre, Vermont, granite held by you or used by you?

A. Not a great deal, because practically all of our work is coming in finished, anyway.

Mr. Hetland: That is all.

Exam. Roberts: Recross?

Mr. Coyne: No, sir.

[fol. 191] Mr. Cronon: Nothing further.

Exam. Roberts: You are excused.

(Witness excused.)

Exam. Roberts: Let's take a recess.

(Short recess.)

Exam. Roberts: We will come to order, gentlemen.

Mr. Morken: I will call Mr. Walther.

NORRIS E. WALTHER was sworn and testified as follows:

Direct examination.

By Mr. Morken:

Q. Will you state your name, please?

A. Norris E. Walther.

Q. That is W-a-l-t-h-e-r?

A. That is right.

Q. Where do you live?

A. Fremont, Nebraska.

Q. What is your business?

A. I am in the retail monument business.

Q. In an effort to shorten this somewhat, you have been present here in the hearing room all day?

A. That is right.

Q. You are familiar with what is proposed?

A. That is right.

Q. And you have heard the testimony of the previous witnesses?

A. Yes, sir.

[fol. 192] Q. Now, generally speaking, is your monument business and your purchase of Barre, Vermont, granite similar to the preceding witnesses?

A. Generally, yes.

Q. Is it different in any way?

A. In as much as I am perhaps a smaller dealer, and I buy the Barre granite, the percentage is less.

Q. About how frequently do you get shipments from Vermont?

A. Six or seven times a year, perhaps.

Q. How do they come to you now?

A. Sometimes we are able to get a pool car, but generally in less than carload lots.

Q. Is your situation with respect to damage, I mean did you sustain damage or breakage similar to the other people?

A. That is right.

Q. Do you have any need in your business for a trucking service from Vermont to Fremont?

A. In my sized business it would be very advantageous to have a service like that.

Q. Why is that?

A. Inasmuch as we are located near to a large what we call retail manufacturing concern, a retailer who does his own manufacturing, his promises of delivery can exceed our promises under the existing situation of comparatively slow delivery, so that it would put us to a much better [fol. 193] advantage if we could rely on a delivery date.

Q. Do I understand he has rough stone on hand and he manufactures where you do not manufacture?

A. That is right.

Q. Everything you order is finished stone?

A. Everything we order is finished, except the processing, as far as the carving and lettering, we do almost one hundred per cent of that ourselves.

Q. I see. How would this proposed service permit you to be more competitive, say, with this larger manufacturer?

A. There are several ways, the chief of which would be the speed of delivery at the pressing times of the year when deadline dates must be met, and it also would accrue to, I believe, a lower rate than we ordinarily get because we have not the use for full carloads of Barre granite that most larger dealers do.

Q. Is your interest in this proceeding one involving the speed of the service or is your interest primarily in a lower rate?

A. Mainly in the speed of delivery.

Q. Are you getting any granite in by truck at the present time?

A. Yes, we are.

Q. And from where?

A. Where? Milbank, South Dakota, and from Cold Spring, Minnesota, and St. Cloud, Minnesota.

Q. You are familiar with truck service and trucks hauling granite?

[fol. 194] A. Yes, sir.

Q. Are you able to compare that with existing rail service?

A. Yes.

Q. How do you compare it?

A. It is faster even at that short distance and much more convenient.

Q. Are you on a rail siding?

A. No, sir.

Q. If a shipment comes to you by rail is it delivered to your door, or do you have to make arrangements to pick it up?

A. On less than carload shipments it is delivered to our door.

Q. Is there additional handlings in rail over truck?

A. Oh, yes.

Q. Is it to your advantage to have a service where there will be less handling of your merchandise?

A. Yes, it would be, as you would have less chance for damage to occur. Every time you handle a piece of stone there is one more change of damaging it.

Q. Would a faster service permit you to maintain a lower inventory?

A. Decidedly so.

Q. Would that be an advantage?

A. From an economic standpoint, yet, it would mean less stock tied up on our hands for perhaps seventy-five percent of the year.

[fol. 195] Q. Have you been interested for sometime in truck service out of the Barre area to Fremont?

A. I have often wondered why we couldn't get it.

Q. If such a service were available to you, would it have meant a saving to you in your business?

A. Yes, it would.

Q. Are you aware of the Dingman Company, the Granite City Transfer?

A. I know the company, yes.

Q. Have you ever used the company?

A. Yes, sir.

Q. When?

A. At various times over a period of my own personal experience in the past six years, perhaps.

Q. Has that service been satisfactory to you?

A. Not always.

Q. Why not?

A. We had occasion to put in a claim for damages, and the claim was ignored. It took us approximately three years to get an answer to a letter, and I had to all personally to St. Cloud to even get to talk to them.

Q. Do I understand that at the time the claim was filed it was three years before it was paid?

A. That is right.

[fol. 196] Q. During that three-year period did you endeavor to follow up on this claim?

A. I wrote several letters, with no answer. Approxi-

mately one year after the letters I called personally at the Granite City Transfer Company's office in St. Cloud on my own initiative.

Q. Did they have a record of the claim?

A. Yes, sir.

Q. While you were there did they pull it out of the file, and did you see it?

A. That is right.

Q. But it hadn't been paid in that year?

A. No.

Q. Was the claim ever denied?

A. They told me at that time that the next time I had a shipment down that way I could deduct that amount out of the freight shipment rather than paying me the claim.

Q. Did the claim arise from the handling of merchandise enroute?

A. No. The claim arose from the apparent inability of a truck driver to back underneath our travelling crane.

Q. And what type of damage did he do?

A. He broke a finished piece of work, lettered, carved, and ready to set.

Q. He backed his truck into it?

A. That is right.

[fol. 197] Q. Do you feel that your past experience with Mr. Dingman as a result has given you confidence as far as using that service in the future, if it was available to you out of Barre, Vermont?

A. Out of Barre?

Q. Yes.

A. If it were the only service available, I think that I would still consider it reluctantly.

Q. I gather if this service is granted and you use Mr. Schaffer you are not going to take any business away from Mr. Dingman?

A. We never had any shipped from Barre by Mr. Dingman.

Q. If it develops here in the record that Mr. Dingman does have authority and has had autority for sometime from Vermont to your area, would the lack of his rendering a service to you be a disservice?

Mr. Coyne: I object to that as being incompetent. The law is well settled that the shipper has the duty of determining who the authorized carriers are.

Mr. Morken: The law is well settled.

Exam. Roberts: Objection overruled.

A. I would say that he certainly didn't advise us of any such available service.

By Mr. Morken:

Q. And if he had, would you have endeavored to use it?

A. Yes, sir.

Q. Do you feel that there is a real need in your business [fol. 198] for Mr. Schaffer's business as proposed?

A. I feel there is definitely a real need inasmuch as in our part of the country dealers are widely separated. We have large territories. Delivery is a major factor, and I think here is a real need for that type of service in less than carload shipments.

Q. Would it be possible that upon the arrival of Mr. Schaffer's truck at your plant in Fremont that you might order him to deliver it on out to some other town in Nebraska as a continuing part of his through-common carrier sdrvice?

A. Not generally. It is a possibility, but it wouldn't be practical.

Mr. Morken: You may examine.

Exam. Roberts: May I ask you a question?

Do you use Mr. Schaffer's service out of Milbank at the present time?

The Witness: No, sir.

Exam. Roberts: You have never used his service?

The Witness: Yes, we have in the past.

Exam. Roberts: Has it been satisfactory?

The Witness: Yes, sir merely a difference in the companies that we purchase from is all.

Exam. Roberts: In other words, you purchase no granite from the Dakota granite companies?

The Witness: Not from the Dakotas.

[fol. 139] By Mr. Morken:

Q. So that it is clear you purchase from the Hunter company?

A. Yes, sir.

Q. Whose trucks is it that deliver to you?

A. Hunter has used his own trucks from Milbank to us.

Cross examination.

By Mr. Coyne:

Q. Mr. Walther, you said that you had a smaller volume than Mr. MacCarty from Barre?

A. Volume, you mean tonnage-wise?

Q. Yes.

A. I would say that we use perhaps only about twenty- to twenty-five thousand pounds of Barre granite a year.

Q. Now, when was the last time you used Mr. Dingman's service from St. Cloud?

A. Of my own volition, three years ago. It was used once this spring without my knowledge.

Exam. Roberts: Was that service satisfactory?

The Witness: Yes, sir.

By Mr. Coyne:

Q. To make the record short but clear on the matter, Mr. Dingman's service was satisfactory to you except for this claim, isn't that right?

A. Yes.

Q. And this claim involved twenty-three dollars?

A. Twenty-three dollars and ninety cents.

Q. And to make the record further clear, the item that [fol. 200] was damaged in this particular claim was an item being transported or an item on your lot?

Mr. Morken: I object to that as repetition.

Exam. Roberts: Objection overruled.

A. It was an item on our lot.

By Mr. Coyne:

Q. It was nothing that he was carrying?

A. My only difficulty with Mr. Dingman has been that I have to get out on the truck in the middle of the night and help them unload their granite.

Q. The damage that you complained of here was an item on your lot and not one that he transported down to you on that load?

A. That is right.

Q. And at the time what happened is that the truck backed into a monument on your——

Exam. Roberts: I think that has been answered.

By Mr. Coyne:

Q. The truck backed into a monument on your lot?

A. Yes.

Q. You were directing the truck at the time it was backing up?

A. Directing it?

Q. Directing the driver.

A. I certainly didn't want him to run into my steel crane.

Exam. Roberts: I think this is a little argumentative.

Mr. Coyne: There is a lot in here with a twenty-three dollar claim.

Exam. Roberts: I think that is the only instance with [fol. 201] which he was dissatisfied.

By Mr. Coyne:

Q. You made no inquiry of Mr. Dingman to determine whether or not he could transport granite from Barre, Vermont, to your place of business, did you?

A. Not directly. I have always asked why we couldn't get such a service and was told that it was not available.

Q. You did not ask Mr. Dingman?

A. No, sir.

Q. Did you ask the ICC director in your vicinity?

A. No.

Mr. Coyne: That is all.

Cross examination.

By Mr. Cronon:

Q. Do you know how many times a tombstone is handled from the time it is taken out of the ground in its rough shape until it is set in the ground at the cemetery?

A. That all depends on who is fabricating it, what kind of a stone, and how many surfaces are finished.

Q. Quite a few handlings, though?

A. Yes.

Mr. Cronon: That is all.

Redirect examination.

By Mr. Morken:

Q. As far as dissatisfactory service, this was a surprise to me. Do I understand that you don't want to get out in the middle of the night and help Mr. Dingman unload his trucks?

[fol. 202] A. I don't like it, no.

Exam. Roberts: Has that been the usual circumstance in regard to Mr. Dingman's service?

The Witness: No. I think they kind of abuse a fellow if they thing a guy—Mr. Dingman's last load arrived at 5:30 in the morning, and the driver called me out of bed and wanted me to help unload it.

Mr. Morken: I have nothing more.

Recross examination.

By Mr. Coyne:

Q. In other words, you would rather have Mr. Dingman come between what hours?

A. Well, I would like to have him come between the hours of 8 and 5.

Mr. Coyne: That is all.

Thank you.

Exam. Roberts: You are excused.

(Witness excused.)

Mr. Hetland: I will call Mr. Stevenson.

PAUL STEVENSON was sworn and testified as follows:

Direct examination.

By Mr. Hetland:

Q. Will you state your name and your residence, please?
A. Paul Stevenson, Moberly, Missouri.
Q. What business are you engaged in?
[fol. 203] A. Retail monument business.
Q. And for how many years?
A. Since September, 1912.
Q. How many retail outlets do you have?
A. Four.
Q. That is in the neighboring area?
A. Right.
Q. You have heard the testimony of the prior witnesses with regard to the application here under consideration and the service which Mr. Schaffer wants to make available to you?
A. Yes, sir.
Q. And you have in the past used rail shipments for Barre, Vermont, granite almost exclusively?
A. Yes, sir, exclusively.

Exam. Roberts: This will be identified as Exhibit No. 9.

(Applicant's exhibit No. 9, Witness Stevenson, was marked for identification.)

By Mr. Hetland:

Q. I show you Applicant's exhibit No. 9. Will you tell me what that exhibit shows?
A. It is a listing of our L.C.L. shipments from Barre, Vermont, to Moberly for the year 1951, the date shipped,

the date delivered, the weight of each shipment, and the number of days for delivery.

Q. You have the bills from which this information was taken with you and in your possession now?

[fol. 204] A. That is right.

Mr. Hetland: We offer Applicant's exhibit No. 9.

Mr. Cronon: I wonder if you would withhold the ruling on that.

Exam. Roberts: All right.

By Mr. Hetland:

Q. What rail facilities are available to you?

A. The Wabash Railroad Company and a branch line of the Missouri and Texas.

Q. You are a terminal point?

A. Right.

Q. And you consider the rail service to be a rather good service because of that fact?

A. Yes, sir.

Q. Do you also use pool car shipments, rail pool car shipments?

A. With other dealers, yes, sir.

Q. How many pool car shipments do you have a year?

A. I think last year we had two, possibly three. I have no record of that. That is to the firm to whom it was consigned with a stopover at Moberly for me to unload.

Q. In other words, you are in a Kansas City pool?

A. Or a local neighboring dealer pool.

Q. You have heard the testimony of prior witnesses on damage, breakage, and spoilage, and is your experience with rail shipments approximately the same?

A. From the damagewise standpoint, we have had very little trouble.

[fol. 205] Q. Do you have a need for the proposed motor vehicle service from Barre, Vermont?

A. I think so, sir.

Q. Would it bring added advantages to you in your business?

A. I believe it would from the experience we have had from other granite shipping centers.

Q. Would you explain that a little more fully?

A. We receive shipments from three major points of operation, the northwest, Georgia, and Vermont. We receive practically all of our shipments from the northwest and from the south by truck, and we find it very advantageous.

Q. Would you consider yourself a bit or small dealer?

A. Let's say medium.

Q. Medium?

A. Small, I think might come nearer fitting the picture.

Q. And is your situation representative of the other retail dealers in Missouri?

Mr. Coyne: That is objected to as being incompetent by this witness.

Exam. Roberts: I will sustain the objection.

By Mr. Hetland:

Q. What do you consider the biggest transportation problem with the existing transportation facilities from Barre, Vermont, to Missouri?

A. In years past, we have used a lot of Barre granite because of the economic structure. The price of it has been [fol. 206] necessary for us to reduce our inventory. If this service were made available to us, we would have a quicker turnover and could replenish more often.

Q. There is an advantage in speed and more frequent delivery?

A. That is right.

Q. Would you purchase more Barre, Vermont, granite if you had such service?

A. There is that possibility.

Q. Do you experience any delay in your pool car shipments?

A. No, sir.

Q. Is there any delay in the pooling itself?

A. Well——

Q. Forming up the pool.

A. No. Ordinarily, that is done with just two or three local concerns, the manufacturers see that it gets together, the point is that the present conditions, it delays a lot of times in getting enough for a pool car.

Q. And approximately how long would that delay be?

A. For example, we had a shipment this year, I mean it arrived in March, and it was started along in October or November.

Q. And you experience the same seasonal rushes, the Memorial Day rush?

A. Oh, yes.

Q. And it would be an advantage to you to have faster more certain service at those peak periods?

[fol. 207] A. Right.

Q. Assuming that authority for Granite City Transfer to transport granite from Barre, Vermont, is established, has Granite City or Mr. Dingman ever contacted you at any time during the year 1952?

A. No, sir.

Q. Would you have used such a service if you had known about it?

A. There is a possibility that we would have.

Mr. Morken: That is all.

Cross examination.

By Mr. Coyne:

Q. Are you willing to use such service now?

A. If it is efficient and satisfactory.

Q. And if a service by Mr. Dingman, doing business as Granite City Transfer, performs the same service and is efficient in doing it, that will satisfy your requirements from Barre, won't it?

A. Well, if we get the service we want.

Q. Now, leaving that for a moment, does exhibit 9 represent the total amount of shipments received by you in 1951?

A. l.c.l.

Q. Did you get any rull carloads?

A. No, sir.

Q. Then this is your total?

A. No, sir. As I explained a moment ago, we had some pool carloads with other dealers.

[fol. 208] Q. And those, I think you testified, came without delay?

A. That is right.

Q. Now, has the applicant represented to you that he will transport individual shipments on your behalf from Barre to your place of business?

A. I will have to go back to the beginning of this thing, if I make that statement, to clarify it.

I believe, Mr. Examiner, that is what I should do.

About a year ago a salesman who sells not only for the northwest but for a firm in Vermont talked to me about the possibility of getting service from Vermont to the midwest, and asked that I write a letter in that regard, and I did.

Exam. Roberts: You speak of motor carrier service?

The Witness: That is right.

By Mr. Coyne:

Q. Do you get granite from St. Cloud?

A. Yes, sir.

Q. Have you had Dingman bring loads into you?

A. I have made inquiries, and they advised me that we have no direct service to Moberly, Missouri. We have had some come in by motor transfer, but I guess that is what you call dry freight picked up by someone in St. Cloud, brought down to the Twin Cities, and then another company into Kansas City, and then another into Moberly.

Exam. Roberts: More than one motor carrier carried it?

The Witness: Oh, yes, a very high rate.

[fol. 209] Mr. Coyne: That is all.

Mr. Cronon: May I see those freight bills, please?

Cross examination.

By Mr. Cronon:

Q. Now, your delivery date is the date that the freight bill bears, isn't that right?

A. Yes, sir.

Q. So that your exhibit 9, the column headed "Date Delivered" represents the date that the local freight agent of the Wabash made out the freight bill which you paid?

A. That is right.

Q. It doesn't necessarily represent the date of delivery?

A. This column represents that, yes.

Q. The "Date Delivered" column?

A. That is right.

Q. And is that date shown under "Date Delivered" taken from the freight bill?

A. Yes.

Q. Well, you made up this exhibit.

A. I took this here as the waybill date, as the date of shipment, and I took this as the date of delivery, even though, you see, it wasn't actually delivered at our plant until the 9th, twenty-seven days later.

Q. Well, the date you just referred to, that is the date that the Wasbash Railroad stamped the waybill paid?

A. That is right.

[fol. 210] Q. That isn't the date that the shipment reached Moberly?

A. The date.

Q. That is the date the freight bill was made out, isn't that right?

A. Yes, I presume so. I don't know their technique.

Q. You don't actually have any document that shows the date that the shipment reached Moberly on the waybill?

A. Only from that expense bill.

Q. I notice on your exhibit 9 that several of the shipments were received during the wintertime. Do you make it a point to put in a stock of memoraisl during the winter?

A. I hardly believe that statement will stand, December, February, May, June, July, September and October.

Q. Well, I see some shipments that were received during November and December and January and March.

A. Four?

Q. Yes.

A. Five.

Q. Why do you get shipments in during the winter if you don't need them until Memorial Day?

A. We have a plant that we like to keep in operation. We like to do our lettering and engraving.

Q. So that you will have them ready for the spring season?

A. That is right, sir.

Q. Well, then, it is a practical thing for you to put in a [fol. 211] supply of memorials during the winter, so that you will be ready for the rush?

A. We carry a stock at all times.

Mr. Cronon: That is all.

Redirect examination.

By Mr. Morken:

Q. Mr. Coyne brought up this matter of knowing of Dingman from St. Cloud, and you said you wrote to shippers in St. Cloud seeking truck service?

A. I talked to them personally.

Q. Whom did you talk to?

A. The Royal Granite Company, Cold Spring Granite Company.

Exam. Roberts: Now, Mr. Morken, you are not interested in any operations out of St. Cloud.

Mr. Morken: No, but I am certainly interested in how Mr. Dingman is holding out this service.

Exam. Roberts: The service that Mr. Dingman is testifying to is service from Barre, Vermont, and St. Cloud is not an issue in this application today.

Mr. Morken: If I may have one more question, and then I will pursue it no further.

By Mr. Morken:

Q. The gentlemen at Royal Granite and Cold Springs said that they could not give you truck service from St. Cloud to Moberly, Missouri?

A. Through truck service.

Mr. Morken: I have nothing further.

[fol. 212] Exam. Roberts: Recross?

Recross examination.

By Mr. Coyne:

Q. Whom did you talk to there, and when did they tell you that?

Exam. Roberts: If it is anything out of Barre, I will listen, but otherwise——

Mr. Coyne: Nothing further.

Mr. Morken: Thank you, Mr. Stevenson.

Exam. Roberts: You are excused.

(Witness excused.)

Mr. Morken: I will call Mr. Hunstad.

ED HUNSTAD was sworn and testified as follows:

Direct examination.

By Mr. Hetland:

Q. Will you state your name?

A. Ed Hunstad.

Q. Where do you live?

A. Aberdeen, South Dakota.

Q. And what business?

A. Retail monument business.

Q. What is the name of your company?

A. Aberdeen Monument Company.

Q. How many years' experience do you have in the business?

A. I have been in the business as a retail merchant myself for seven years, but I have worked in the business for fifteen.

[fol. 213] Q. You have been in the Aberdeen Monument Company seven years?

A. That is correct.

Q. You have heard the testimony of the prior witnesses here today?

A. I have.

Q. And you are familiar with the application and the proposed service to be offered by Mr. Schaffer?

A. Yes.

Q. Do you feel that you have a real need for such service?

A. I do.

Q. And what is that need?

A. Being termed a small dealer and being unable to stock carload shipments from Barre, Vermont, and also because it is not practical for me to pool cars with any of the dealers in my vicinity that handle Barre granite, because of our great distances between dealerships, we must ship in smaller than carload lots. I find that truck service would help my business considerably.

Q. You have had some l.c.l. shipments this year from Barre, Vermont, to Aberdeen, South Dakota?

A. Yes, I have.

Q. And what was the average time for delivery?

A. I haven't that information with me, except I took along, I guess, the last shipment that came in, and I believe that is seventeen days.

[fol. 214] Q. Would you consider that to be representative of the time?

A. I would say that was a very good representation. I believe that it was seldom that we have gotten it any sooner than that.

Q. You have heard the testimony of the other witnesses with regard to damage and breakage and stains and spoilage of granite by rail shipment, and has your experience been approximately the same as the other witnesses?

A. Our experience hasn't been good. We found that in l.c.l. shipments many of the crates are broken. When a crate is broken, even though the monument or marker has not been damaged, it still is hard to handle that crate, it involves more time, and I have one specific case here where we did have a loss on account of a monument damaged.

Q. Would you consider a speedier more frequent service to be a business advantage to you?

A. Yes.

Q. Do you believe that morot vehicle service would give you more speedy and more frequent service?

A. I feel that way.

Q. Has Mr. Dingman or Granite City Transfer ever solicited your business from Vermont to Aberdeen, South Dakota?

A. No, they haven't.
Q. Did you know that such a service was available?
A. No, I didn't. I inquired from the Rock of Ages Cor-
oration this past spring for a service that would bring
fol. 215] the granite to our place of business in less time
nd in better shape, and I was informed by the Rock of
ges people that there was no such service available.
Q. Do you deal primarily with finished or unfinished
ieces of granite?
A. Finished except for lettering.
Q. If a piece of granite is completely damaged, will you
ttempt to repair it yourself?
A. I have no way of repairing it.
Q. It would be necessary for you to replace any piece
f granite damaged in shipment?
A. Yes.

Mr. Hetland: Your witness.

Cross examination.

By Mr. Coyne:

Q. What would your annual volume be on Barre?
A. I would say—tonnage?
Q. Yes.
A. Twenty-five or thirty thousand pounds.
Q. Has the applicant outlined to you how he is going
o serve you?
A. I am somewhat familiar. Shall I state it that way?
Q. Yes.
A. With their operation. We are only one hundred
niles from Milbank, so I was quite familiar with the
perations of both Hunter and the Dakota Granite Com-
pany, and through that knowledge I derived my idea of
fol. 216] what kind of service we might be able to get
rom Barre, Vermont.
Q. But now has this applicant, Mr. Schaffer, repre-
ented to you that if you called him up over the telephone
nd told him that you had six hundred pounds in a ship-
nent of granite, that you wanted to get from Barre, Ver-
nont, that he would go to Barre and get it *to* for you and
ring it back?

A. He certainly didn't.

Q. Then the service that you expect to get from him if he is granted this authority, is to participate in split delivery of truckload shipments t at will be pre-arranged by the shipping department of the quarry where the granite comes from, is that correct?

A. Partially so, yes.

Q. In what respect wouldn't it be right?

A. I presume that in cases where we would, we will say that our orders for a certain time had accumulated to ten thousand pounds, I think it would be easy to take it to whatever truck concern was operating, and I believe that they would get enough tonnage in that vicinity that I could get pretty speedy service.

Q. So that if you permitted your own merchandise to accumulate to ten thousand pounds, that you would contact a trucker to make a full truckload and get speed service?

A. That is right.

[fol. 217] Q. About how many months would it take you to accumulate your own orders until you get ten thousand pounds?

A. It might be overnight, it might be quite a while.

Q. Your past experience has been about twenty-thousand pounds a year?

A. That is right, but I might sell it all in one month.

Q. Oh, I see. If that is done and you are able to get such ten thousand pound accumulation of orders, are you willing to use whatever carrier might be available, providing they give you adequate service?

A. The best service.

Q. And you have no complaint against the services of Granite City Transfer, do you?

A. I haven't anything to base it on.

Q. And if they are authorized by the I. C. C. and render a service comparable to what the applicant proposes and you use them, that would fulfill then your needs?

A. If their service was all right.

Mr. Coyne: That is all.

Thank you.

Redirect examination.

By Mr. Hetland:

Q. Do the dealers specify the type of transportation which will carry their granite from Vermont to South Dakota?

A. We usually have to specify ours by the fastest and cheapest route.

[fol. 218] Mr. Hetland: That is all.

Exam. Roberts: You may be excused.

(Witness excused.)

Mr. Hetland: I will call Mr. Farrell.

RICHARD C. FARRELL was sworn, and testified as follows:

Direct examination.

By Mr. Hetland:

Q. State your name.

A. Richard C. Farrell.

Q. Where do you live?

A. Loves Park, Illinois.

Q. In what business are you engaged?

A. We are engaged in the retail monument business.

Q. Where is your business located?

A. Our business is located in Loves Park, and, that is, for your information, a suburb of Rockford, Illinois.

Q. How long have you been engaged in the retail monument business?

A. Approximately six years.;

Q. You have heard the testimony of the other witnesses here today and you are familiar with the proposed service to be supplied by Mr. Schaffer, should his application be granted?

A. I am.

Q. What present transportation service do you have [fol. 219] available from Barre, Vermont, to Rockford, Illinois?

A. The only transportation service at the present time is rail from Barre, Vermont, to Rockford.

Q. You do purchase granite at Barre, Vermont?

A. That is right.

Q. And approximately how many pounds?

A. I would say about twenty to twenty-five thousand pounds a year.

Q. How do you receive the shipments?

A. Our business is peculiar from most of the other gentlemen, inasmuch as we are dealing with custom designed monuments, and every piece that has been ordered from Barre, Vermont, has been custom designed, and when it is shipped to us it is ready to erect in the cemetery with no handling, and because of that fact we receive maybe one, two or three shipments from Barre a month.

Q. Now, out of Barre how do those shipments come?

A. We have never bought a piece of granite in carload lots yet from any source. They all come l.c.l.

Q. And you don't have any pool car arrangement?

A. I believe some did come in in pool car. I don't frankly know.

Q. Where would be your terminal point on a pool car?

A. I believe it would be Proviso, Illinois, or Chicago, if I am not mistaken.

[fol. 220] Q. And L.C.L. from then on?

A. Yes.

Exam. Roberts: You move into your plant by motor carrier from these break-bulk points?

The Witness: All of our freight comes into the railroad station, and the only way we can get it to our plant is by motor carrier.

By Mr. Hetland:

Q. Do you use your own trucks, or do you hire the motor carrier service from the delivery points?

A. I would like to bring this out, that it has a very direct effect upon our business, whereas the gentleman from the railroad pointed out that the date that is on our ticket as the freight arriving, that does not necessarily constitute

delivery to us because here is what has happened. We have had granite come in that had a rate on it that entitled us to delivery to our door and when they inquired as to when that delivery was going to be made, the railroad told us that it would be made at their convenience, which is only natura-. However, sometimes their convenience turns out to be a week or ten days subsequently. What we have actually done, even though our rate is such that we are entitled to free delivery, if we were under the impression that the granite was at the railroad station, we took our truck down there and took it out, and because of the nature of the work that we are doing, if the monument was delivered to the railroad station and unloaded, we were able to get it into the [fol. 221] cemetery that same day.

Q. What has been your experience on the time in transit from Barre, Vermont, to Rockford, Illinois, by L.C.L. rail?

A. I must plead ignorance, and in this particular case, as far as when the railroad got it, and when we received it, I do know this that the bill of lading that accompanied our invoice, which was stamped as being received at the Barre Guild, was perhaps August 7th. There have been many times when we actually got our hands on the granite a month after that.

Q. In other words, you have experienced one month in transit from the time it reaches the Barre Guild Consolidation point to the time of delivery in Rockford, Illinois, at the rail station?

A. That is right. I would like to say that I am not condemning that particular phase of this matter, the railroads in this matter, although I know all we are interested in doing is to get our hands on the merchandise, and it has been from three to five weeks before we have been able to place our hands on that monument.

Q. What has been your experience with regard to damage and stains in rail shipments or l/c.l. shipments?

A. We have a claim at the present time, which, I believe, is about four weeks old, from Barre, Vermont. We have had unusual experiences with relationships to recent oil. In fact, in our yard at the present time, we have markers [fol. 222] that have not yet been uncrated that have grease on them so thick that we would have to scrape them off

with a putty knife. We have made a sincere effort to get to the bottom of it. When the quarry representative was out to our shop we instructed him to go back to the quarry and see if that could have been done at the quarry in loading, and frankly, it does seem that because of the locality we are in, which is basically a manufacturing center, that granite happened to be laying underneath the piece of machinery where the grease or oil had dropped onti it, and we have experienced considerable trouble in relationship to that thing.

Q. And you have experienced cracking approximately the same as the other witnesses?

A. Yes. There was a time when we had filled what I thought was so many claims over a short period of time, and right as at the present time we have a marker that is at the Northwestern Depot in Rockford, the value of which was six dollars and fifty-cents, and rather than go to the trouble of filing a claim, we just wrote it off.

Q. You stated before that most of your work is custom designed? Suppose you sustain a damage to that either by cracking or staining, do you repear it yourself, or is it necessary to replace it?

A. It is necessary to replace the complete finished product.

Q. And you can only obtain that from Barre, Vermont?

A. Well, naturally.

[fol. 223] Q. And it would take you the same length of time as a new order?

A. Yes, in our particular case a little bit longer, because it has to be fabricated in their factory.

Q. Do you feel that there is a need for the service proposed by Mr. Schaffer in the application under consideration?

A. I very definitely feel that in our particular case there is a need for motor transportation, particularly in our location and the things we have to contend with.

Exam. Roberts: From Barre, Vermont?

The Witness: That is correct.

Exam. Roberts: You don't obtain anything from Milbank, South Dakota?

The Witness: No, we do not.

By Mr. Hetland:

Q. Would it be a business advantage to you to have speedier more frequent service?

A. It certainly would, and, of course, I won't elaborate on this, but we are working on a condition that is definitely different than most monument companies. In fact, our competition thrives on that very thing, their advertising, their play-up as being able to deliver, and they know that we have had trouble in getting delivery, and the present Memorial Day advertisements were worded in that way, that we can give you immediate delivery.

Q. Do you feel that the existing rail transportation is the primary cause for your inability to——

Mr. Cronon: That is objected to as being leading.

[fol. 224] Exam. Roberts: Objection overruled.

A. If you are speaking specifically of Barre, Vermont, to our location, I would say that was because of railroad transportation.

By Mr. Hetland:

Q. Do the dealers generaly specify the type of transportation from Barre, Vermont, to Rockford, Illinois?

A. We have in our records letters that we have——.

Exam. Roberts: Let's be a little more specific.

Mr. Cronon: Before he answers, I would like to know what dealers counsel refers to.

Mr. Hetland: I refer now to one dealer, himself.

(Question read.)

By Mr. Hetland:

Q. Do you as a dealer——

A. We have directed them to send our freight in a way they see fit to give us the speediest delivery.

Q. Have you ever heard of Granite City Transportation Company?

A. No, I have not.

Q. Have you ever been solicited by Mr. Dingman with reference to motor transportation from Barre, Vermont, to Rockford, Illinois?

A. No, I haven't.

Mr. Hetland: That is all.

Cross examination.

By Mr. Coyne:

Q. You say you receive one or two to three shipments a month?

[fol. 225] A. From Barre.

Q. Then if you had available to you one trucking company, such as Granite City Transfer, who will transport those shipments to you direct by truck without interchange or interlining of any type, that would fulfill your requirements would it not?

A. Not necessarily. I feel that I am taking your question just as you worded it. If we had one trucking company available that wouldn't satisfied our needs, is that what you said?

Q. Yes.

A. I don't believe so. I don't believe that one trucking company could possibly carry on the job.

Q. Well, that is not my question. If the Granite City Transfer Company is willing to transport your monument from Barre, Vermont, to your place of business in Rockford in five to six days time in transit, wouldn't that fulfill your transportation requirements?

A. That would, and, of course, you are basing your question on the assumption that it could be done.

Mr. Coyne: That is all.

Thank you.

Cross examination.

By Mr. Cronon:

Q. Mr. Farrell, when you estimate the time in transit on a shipment from Barre to Loves Park, Illinois, do you take

the date on the bill of lading as the date that the shipment actually left Barre?

[fol. 226] A. Actually, I tried to figure that out. I have some freight bills with me. I imagine that the date on the bill of lading is such that that granite was ready to be picked up. I can't tell by our freight bills just exactly when that left. All I know is how long it took.

Q. Let's refer to that marker that you say sat in the depot at Rockford, Illinois.

A. That is correct.

Q. And Rockford, Illinois, is served by the Chicago Northwestern Railway?

A. We do receive granite from the Chicago Northwestern, the Illinois Central, and the C. B. & Q.

Q. From Barre, Vermont?

A. No, I didn't mean that.

Q. This particular shipment was from Barre?

A. That is right, and that varies, too, as we get our granite from Barre both by the Northwestern and the Illinois Central.

Q. This shipment was from Barre that sat in the depot at Rockford?

A. That is right.

Q. And it sat in the Northwestern Depot?

A. That is correct.

Q. Do you know what date it was that that shipment arrived in the depot at Rockford?

A. No, I do not.

[fol. 227] Q. You don't remember, is that correct?

A. I don't know. We have a very sad experience relative to this. I can't answer.

Mr. Cronon: I move that his answer there be stricken.

Exam. Roberts: It will remain.

By Mr. Cronon:

Q. Now, Mr. Farrell, you don't know the date that the shipment arrived in the Northwestern depot in Rockford?

A. No.

Q. Do you remember the exact date when it was delivered to your place of business?

A. Actually, if I recall correctly, as it turned out, the shipment was never delivered to our place of business.

Q. Where was it delivered?

A. We went our truck down and finally disposed of the material.

Q. What data was it that you sent your truck down to the Northwestern Depot?

A. You mean how long after the arrival?

Q. What date, month, day and year?

A. I don't remember.

Q. Did you make a compliaint to the Northwestern Railway about the delay in delivery of that shipment?

A. We have many times discussed that with them as to how long it would take.

Exam. Roberts: Just answer the question.

The Witness: Yes.

[fol. 228] By Mr. Cronon:

Q. And where did you file it?

A. It was verbal. I talked to the gentleman in charge of the freight shipments.

Q. At Rockford, Illinois?

A. Yes.

Q. Do you have any idea what month of the year that was?

A. It is physically impossible for me to recall.

Q. For something that seems to have gotten under your skin so much, you don't seem to have very much specific information about it.

A. Actually, what has happened in the meantime is that we never now have the railroad deliver the granite to our door. We always pick it up, and that has saved us a lot of trouble. It has become relatively unimportant to us. They mail us a card, and we send our men down and get the granite so it has worked out very nicely.

Q. Do you get an allowance for making the pickup?

A. Yes, if the freight rate was such that we were supposed to get delivery, they make the allowance to come down and pick it up.

Q. If this application is granted do you propose to ship your two or three pieces of granite a month via the applicant instead of via the railroad?

A. Well, actualy, I do believe that in our setup there we would.

[fol. 229] Q. In other words, all of your business will be transferred to the applicant, is that correct?

A. It is only correct to this point that I do believe that the railroad has rendered us a service, whereas most of the time we are very dependent on the delivery, if we do not need it in six days, there is no reason to take it away from the railroad.

Q. I will ask my question again. If the application is granted do you propose to transfer all of your business to the applicant?

A. No.

Q. Why will you leave some business to the railroad?

A. When we order stone, it is immaterial to us then on some orders how soon we get it, and I do know this, that there have been times when we were able to pick up the granite at the railroad at our convenience, and we went down there any time of the day.

Q. How long have you been in business, in the monument business, in Loves Park?

A. About six years.

Q. And has your business prospered?

A. Yes, sir.

Mr. Cronon: That is all.

Mr. Coyne: That is all.

Mr. Morken: No further questions.

Exam. Roberts: You may be excused.

(Witness excused.)

Exam. Roberts: Off the record.

[fol. 230] (Discussion off the record.)

Exam. Roberts: On the record.

Mr. Morken: The applicant rests provisionally at this time for the purpose of making this motion.

The motion is that this hearing be continued to a further hearing in Montpelier, Vermont. A similar motion was made by the railroads, to which I obj cted, and it was denied.

If that motion is denied, I make a motion on my own behalf at this time for such a hearing, and the reasons for the motion are these: I plead surprise in connection with the testimony of the Witness McBride. The Examiner sustained objections to his testifying as to certain concerns, one of which was available in Minneapolis yesterday, and I could have had present at the haring, but thinking that the Witness McBride could supply their testimony, I did not see fit to call those witnesses. At the further hearing in Vermont it is our intention to produce several manufacturer shippers who are located in the Barre-Montpelier, Vermont, area. It will not be cumulative testimony in that we have had Witness McBride testifying about the Barre Association and the Guild, and this testimony will deal with individual companies and their needs for the service.

Mr. Coyne: For the record, I would like to show that the intervenor, William Dingman, doing business as Granite City Transfer, objects to any such further hearing. The applicant had due notice of this hearing today and should [fol. 231] be fully acquainted with the Commission's Rules of Procedure and Practice.

If he permitted witness who were in his office yesterday and whom he even admits he talked with this morning to go home to Vermont, I think it is just his misfortune.

We object to it. We maintain we would be prejudiced to a great extent. We also make claim that to allow such would establish an unwise precedent in that it would permit an applicant to come to a hearing prepared just so-so, and then upon finding certain opposition, ask for a continuance to better prepare himself.

So for the basic principle involved, in addition to the first reason, I formally object on the record.

Exam. Roberts: In view of the telegram read into the

record by Mr. Morken earlier today, the Examiner is forced to deny his motion for a further hearing at this time, which is, of course, without prejudice of the applicant requesting a further hearing with the Commission.

Mr. Hetland: You haven't made a ruling on Exhibit 9.

Exam. Roberts: Is there any objection to exhibit 9?

Mr. Cronon: I object as there is no proper foundation for it in that the documents that were shown to me by Mr. Stevenson to support it do not indicate the actual date of delivery at Moberly, Missouri.

Exam. Roberts: Is that an objection you are making?

[fol. 232] Mr. Cronon: That is an objection.

Exam. Roberts: I will receive the exhibit over the objection.

(Application's exhibit No. 9, Witness Stevenson, was received in evidence.)

Exam. Roberts: Let's take a five-minute recess.

(Short recess.)

Exam. Roberts: We will come to order.

Mr. Coyne: I will call Mr. Dingman.

WILLIAM M. DINGMAN was sworn, and testified as follows.

Direct examination.

By Mr. Coyne:

Q. Will you state your full name?

A. William M. Dingman.

Q. Where are you from?

A. St. Cloud, Minnesota.

Q. What is your occupation?

A. Doing business as the Granite City Transfer.

Q. What is the business of Granite City Transfer?

A. Transportation of granite, finished and rough, and supplies used in the manufacturing and fabricating of granite, supplies and machinery.

Exam. Roberts: These will be marked as Intervenor's exhibits No. 11 and 11 for identification.

(Intervenor's exhibits Nos. 10 and 11, Witness Dingman, were marked for identification.)

[fol. 233] By Mr. Coyne:

Q. Now, Mr. Dingman, I show you what has been marked as exhibit 10 and exhibit No. 11 and ask you if those two exhibits correctly define the authority that you presently hold from the Interstate Commerce Commission?

A. Yes, sir.

Exam. Roberts: These will be marked as exhibits No.s 12 and 13.

(Intervenor's exhibits Nos. 12 and 13, Witness Dingman, were marked for identification.)

By Mr. Coyne:

Q. Now, I show you a map which the reporter has marked as exhibit No. 12, and I will ask you to state whether or not that map correctly portrays the states which you are authorized to serve from Vermont on the transportation of granite insofar as they are affected by this application.

A. Yes.

Q. Now, I will show you a comparable map which I, as your counsel, have prepared and which the reporter has marked as exhibit No. 13, and ask you if that properly portrays the states served by Granite City Transfer from Grant County, South Dakota, insofar as affected by this applicant's application.

A. Yes, sir.

Q. Now, Mr. Dingman, what equipment does the Granite City Transfer company operate?

[fol. 234] A. I have five units which have a maximum capacity of approximately twenty-five thousand pounds, and I have five pieces of equipment that have a maximum capacity of approximately thirty-two to thirty-three thousand pounds.

Q. What type of motor power do you have on those units?

A. Well, they are all on the larger pieces of equipment,

the engine displace is from four hundred and five cubic inches up to five hundred seventy-five cubic inches.

Q. And what make are they?

A. Internationals, Federals and Diamond T's.

Q. What type of trailers do you have?

A. Single axle and tandem axle.

Q. And the single axle hold twenty-five thousand pounds?

A. Yes, sir.

Q. And the tendem up to thirty-two?

A. Up to thirty-two or thirty-three thousand.

Q. Is all of that equipment in good mechanical condition?

A. Yes.

Q. What experience have you had in the transporting of granite?

A. Hauling since 1941.

Q. Do you haul any other commodities?

A. We haul all of the machinery and supplies used in the manufacturing and fabricating of granite.

Q. And anything else, is there any other commodity?

A. No, that is all.

[fol. 235] Q. Are you drivers experienced in the handling of granite and granite products?

A. Yes, sir.

Q. Referring to the portion of the present application that seeks authority from Grant County, South Dakota, to eastern states, do you presently operate into the States of Vermont, Massachusetts, Connecticut, Maryland, and the District of Columbia?

A. Yes.

Q. Referring now to the portion of this instant application that seeks authority from Vermont to certain midwest states, do you presently hold yourself out and actually operate from Vermont to the States of Wisconsin, Illinois, Oklahoma, Nebraska, South Dakota, Minnesota, Iowa, and Kansas?

A. Yes, sir.

Exam. Roberts: Under what authority is that?

By Mr. Coyne:

Q. Now, the authority that you perform this transportation from Vermont back to these midwest states that we have named arises under what authority issued by the Interstate Commerce Commission? I refer to Exhibit 11, and ask you if the authority is stated there.

A. Yes.

Exam. Roberts: Just a minute.

Now, will you point out Exhibit 11?

Mr. Coyne: Now, Mr. Examiner, at this time I would [fol. 236] like to withdraw Exhibit No. 12, which is a map prepared, in that I prepared it incorrectly, apparently relying on some language——

By Mr. Coyne:

Q. The delineation on Exhibit No. 12 does not accurately portray your existing authority to Vermont?

A. Yes.

Q. Now, Exhibit 13 does accurately portray your authority from Grant County, South Dakota, to the states in the east, all as authorized by the authority granted in Exhibit No. 10, which is Sub 3?

A. Correct.

Q. Now, going back to your equipment, is this fully occupied at the present time?

A. No, it has not been since Decoration Day.

Q. Does your equipment ordinarily, one hundred per cent of it, have occupancy during the year in the transportation of this commodity?

A. No, it is not.

Q. To what extent do you ordinarily utilize your equipment?

A. Just during the sixty days before Decoration Day. We use all ten pieces of equipment then. Prior to that we use around seven or eight pieces.

Q. And if the need should arise for more equipment are you in a position to supplement your fleet of trucks?

A. Yes, sir.

Q. How would you supplement them?

[fol. 237] A. Either purchase or lease. I have trucks that are available to lease.

Q. Is the Granite City truck line financially able to purchase new equipment, if that is required?

A. Yes, sir.

Q. Now, on the movements from Grant County, South Dakota, to points in the states of Vermont, Massachusetts, Connecticut, Maryland, and the District of Columbia what time in transit would you offer shippers?

A. Oh, five to six days.

Q. And that has been your experience in the past over such a distance?

A. Yes, sir.

Q. Now, how far are you located from Grant County, South Dakota?

A. One hundred forty miles.

Q. In your eleven years of experience in transporting granite what amount of notice have you received before equipment is needed by the shipper?

A. Oh, they usually call and give us anywheres from two to five or six days' notice.

Q. And in the past have you operated from Grant County, South Dakota, to points in these eastern state for which the applicant seeks authority?

A. Yes, sir.

[fol. 238] Q. Have you had any complaints from the shippers that you have served in Grant County, South Dakota, on your service?

A. No.

Q. Are you willing to perform the service requested by Witness Stengel from Grant County, South Dakota, to points in the states which you are authorized in the east?

A. We have rendered that service to him up until the last eighteen months.

Q. Was there any complaint to you from his company during that period?

A. No.

Q. Why have you not rendered such service during the past eighteen months?

A. His tariff rate is considerably lower than mine.

Q. Has any other reason been put forth to you?

A. That is the only one.

Q. Aside from the rate differential, do you still hold yourself out to haul any and all shipments for Stengel?

A. We are still hauling for Hunter and Stengel.

Q. Who is Hunter?

A. He is the other granite concern in Milbank.

Q. In other words, you are hauling from Milbank now?

A. That is right.

Q. Has there been any complaint from him as to your service?

A. No.

[fol. 239] Q. Now, on your return movement from Vermont to points in Grant County, South Dakota, would you be able to serve Stengel?

A. Yes.

Q. What time in transit would you provide him on return?

A. About six days.

Q. Six days.

A. Yes.

Q. Now, on movements from Vermont to points in Minnesota to which you are authorized, what time in transit can you give?

A. About five days.

Mr. Morken: We are referring again, now, to the movements from Vermont to Minnesota, that last question was Vermont to Minnesota?

Mr. Coyne: Yes.

Mr. Morken: I will object to it as being no authority, none evidenced in the record, and if such hauls have been made, they are illegal, and this carrier has shown no authority where he can haul from Vermont back.

Exam. Roberts: Does the intervenor have authority to operate out of Vermont?

Off the record.

(Discussion off the record.)

Exam. Roberts: On the record.

You have no other operating authority than that which you submitted here as Exhibits Nos. 10 and 11, have you?

[fol. 240] The Witness: No.

Exam. Roberts: They are the only certificates that have been issued to you by the Interstate Commerce Commission?

The Witness: Those are the two last ones.

Exam. Roberts: That is the only operating authority that you now have from the Interstate Commerce Commission, is that right?

The Witness: That is right, as far as I know. I went into the Interstate Commerce Commission office the day before yesterday and told them that I wanted to be sure that I had my right authority with me, and Mr. Hendrick over there checked over the tariff sheet, and he said, "Yes, this agrees with what you have on the record."

Exam. Roberts: You ought to know what certificates you have.

The Witness: We have corrected this last one three times.

Exam. Roberts: That is on the one dated December 6, 1951?

The Witness: Yes.

Exam. Roberts: I will sustain the object, Mr. Morken.

Mr. Morken: Following that objection to sustain, I now move to strike from this record all of Mr. Coyne's cross-examination and all testimony that was responsive to those questions by the witnesses that resulted in Mr. Dingman's proposed ability or proffered service from Vermont back to the area in question.

Exam. Roberts: I will overrule your motion to strike. [fol. 241] The record will stand as made.

Mr. Coyne: Subject to our ability to prove the service.

Mr. Morken: I think I am entitled to know what I am going to meet, and if you have anything and if you have any interest in this proceeding, as far as Vermont is concerned, I ask you to state what your position is now and what your authority is.

Exam. Roberts: I think the certificates that he has offered as Exhibits No. 10 and 11 speak for themselves. As far as I can see, there is no authority in there, and Mr. Dingman admitted that there was none in there.

These exhibits show no authority from Vermont, do they?

The Witness: No.

By Mr. Coyne:

Q. Now, Mr. Dingman, you are a common carrier and your operation is out of Grant County, South Dakota, is that correct?

A. That is correct.

Q. How will the granting of this application, if it is granted to the applicant, affect your services?

A. Well, it will curtail my services the same as the other authority.

Q. What effect was there upon you when his last authority was granted?

A. I lost some of the business due to the difference in rates.

Mr. Morken: I object to that answer as being self-serving and a conclusion on the part of this witness, and once more [fol. 242] it is contrary to the facts that have been in this record.

Exam. Roberts: Objection overruled. The answer may stand.

By Mr. Coyne:

Q. And if this application is granted and the applicant is authorized to transport additional volume out of Grant County, South Dakota, to additional points in the east, will that curtail your service from that origin point in the future?

A. Yes, sir.

Q. Are you generally familiar with the amount of production in Grant County, South Dakota?

A. Yes.

Q. Are you aware of all of the producers and manufacturers of granite in their capacity which are located in that county?

A. Yes.

Q. With that in mind, what is your opinion in consideration of their production and your transportation facilities as to whether you can adequately handle and meet their

demands to points in the states of Vermont, Massachusetts, Connecticut, Maryland and the District of Columbia?

A. We took care of all of their hauling up until Mr. Schaffer got his permits. We were able to take care of it, and after he got his permits he hauled the granite from the Hunter Granite Company at that time and possibly a year and a half or two years, and we hauled from the Dakota Company, and now it has reversed itself and we are hauling from Hunter and he has the Dakota Company.

[fol. 243] Q. Do you believe with your equipment that you are capable of meeting all of the demands of all of the prospective shippers in the East?

A. Yes, sir.

Mr. Coyne: I believe that is all.

Cross-examination.

By Mr. Morken:

Q. Mr. Dingman, how many trucks a day or a week or a month or some reasonable periods, let's take the last month, the month of May, did you haul out of the Grant County area?

A. Last month?

Q. Yes.

A. I would say we possibly hauled ten loads.

Q. Now, is that an average month for you or is that a low month or a good month?

A. That is above average.

Q. And they were all for one manufacturer?

A. That is right.

Q. Now, how many loads during the same time did you haul out of the St. Cloud area?

A. We possibly hauled thirty loads.

Q. How many manufacturers do you serve in the St. Cloud-Cold Springs area?

A. We hauled from four large ones, and then there are [fol. 244] another five or six very, very small ones.

Q. All together there are about sixteen manufacturers in the area?

A. Yes.

Q. I believe you are the only carrier holding interstate authority operating out of the St. Cloud area to the surrounding states?

A. That is correct.

Q. Do you feel that your monopoly in the St. Cloud area is subsidizing this loosing operation that you are conducting out of Milbank?

A. Again, please.

Q. Is the St. Cloud area subsidizing your Milbank operations or the Grant County operations?

A. No, sir.

Q. Your Grant County operations are profitable?

A. Yes, sir.

Q. Are they less profitable there where you have competition than where you have it all to yourself in the St. Cloud area?

A. No.

Q. They are equally profitable?

A. Yes, sir.

Q. Can you tell me again in some reasonable period, and if you want to make it this year, you do so, how many loads have you hauled from Grant County to the State of Maryland?

A. I wouldn't be able to answer that question.

[fol. 245] Q. A few, maybe one or none?

A. Possibly not a full load at any time, as they were probably consolidated loads.

Q. I see. How about Washington, D. C.?

A. That would be part of the consolidated load going in there.

Q. Connecticut?

A. Same thing. Those states are all small states and dealers are very small, and they practically consist of consolidated loads, outside of the large manufacturers that we have in St. Cloud that have building jobs.

Q. I gather that your service that way is quite similar to Mr. Schaffer's in the physical operation end of it?

A. Well, I don't think we consolidated as many stops on one load, because we are able to gather from more manufacturers at one time.

Q. The service that you both render is a badly needed service by these small manufacturers, is it not?

A. Yes, sir.

Q. And it is something, as these man have testified, that is very good for their business and it is good transportation?

A. Yes, sir.

Q. Now going back, as I got to Connecticut, would your answer as to Massachusetts and Vermont be the same that since the first of the year you might not have had any straight truckloads but had some split loads in there?

[fol. 246] A. Massachusetts, we have had some full loads and in upper New York State.

Q. New York isn't involved in my questioning. Now, in Vermont and Massachusetts and Connecticut and Maryland, and the District of Columbia, can you tell me how many total loads you have had in all of them since the first of the year or some other period that is representative?

A. That would be hard for me to answer. I don't do the dispatching.

Q. You bothered to come down here for this proceeding, did you not?

A. Yes, sir.

Q. I mean that is your home up there?

A. Yes, sir.

Q. And you went to the trouble and expense of getting Mr. Coyne up here from Madison?

A. Yes, sir.

Q. Now you stated in your direct examination that if this authority is granted that the possible loss of business is doing to curtail your present service. How much business are you going to lose if we get it all?

A. You mean just the New England states?

Q. I asked you about Maryland, the District of Columbia, Massachusetts, and Vermont. I asked you how much business you were going to lose. I asked you to pick a representative period.

[fol. 247] A. We would probably lose four loads a month.

Q. Now, have you hauled four loads a month since the first of the year?

A. I think so.

Q. Your memory is getting a little sharper now.

A. It is in there pretty close.

Q. You didn't both to make a check on exactly what you were hauling?

A. No, I did not.

Q. Why not?

A. I didn't give it that much thought.

Q. Now very important to you then?

A. Yes, it is important, very important.

Q. Then, why didn't you check?

A. I was sick all day yesterday for one thing.

Q. You have had notice of the filing of this application for over a year?

A. Yes, sir.

Q. You had notice of this hearing for approximately thirty days?

A. I think so.

Q. If you have four loads a month down into these states, what is your total operation a month? How many loads do you haul all together in your over-all operation?

A. Oh, somewheres around forty.

Q. Do I understand, then, that ten percent of your total [fol. 248] business goes into these states?

A. Yes, sir.

Q. And out of Grant County, South Dakota?

A. I am talking about both St. Cloud and Grant County.

Q. You understand we are not applying for authority out of St. Cloud?

A. You asked me how many loads I was hauling.

Q. Let's get it down to the amount of tonnage that you hauled into these states out of Grant County.

A. I would say probably two loads a month out of Grant County.

Q. Two out of about forty loads a month, overall?

A. Yes, sir.

Q. Why do you think that you would lose this tonnage that you are now hauling for Hunter; he is not using Schaffer now, is he?

A. No, but they might kiss and make up to him and with his better rate that he has been having in the past, why, we would naturally lose it.

Q. You don't think that your service is superior, then in any way, then, that you could hold the business?

A. I say it is equal. He is local over there.

Q. He is locally accessible?

A. Naturally if everything was equal, with a better freight rate, they would give it to the local man.

Q. The fact that he does reside in the area, that is a [fol. 249] definite advantage in Schaffer's favor?

A. We took care of it for ten years over there.

Q. Until Mr. Schaffer got going?

A. Yes.

Q. I gather you are not afraid of competition, are you?

A. No, sir.

Q. Have you any objection if we apply for St. Cloud and that area?

Mr. Coyne: I object to that as immaterial.

Exam. Roberts: I will sustain the objection.

By Mr. Morken:

Q. You made the statement that you had sufficient money to purchase additional trucks if they were needed?

A. Yes, sir.

Q. How much money have you got?

A. I got enough to buy enough trucks to take care of all the hauling I get.

Q. Do you have a financial statement with you?

A. No, sir.

Q. Do you have a profit and loss statement?

A. No, sir.

Did you know that you were going to testify that you had enough money to expand to purchase additional equipment?

A. Well, I have been able to take care of all the hauling in that area, so I didn't see any particular a reason that that would be a question of much importance.

[fol. 250] Q. What is your operation ratio?

A. Ninety-two to one hundred total.

Q. If you lose all of these two carloads a month, figuring in the neighborhood of one fifth of your business, your operating ratio would still be less than one hundred?

A. That isn't the question if I lose that much to Mr. Schaffer and so much to somebody else and so much to somebody else, then the first thing I am sitting on a limb.

Q. You don't think that our service will hold you up as far as competing with these other gentlemen?

A. Well, my service will hold it up. What business I have lost has been a price rate, not a service rate.

Exam. Roberts: That two or four loads a month you said you would possibly lose, that would be freight out of Grant County?

The Witness: Yes.

By Mr. Morken:

Q. Two loads?

A. From two to four in that particular area.

Exam. Roberts: In Grant County?

The Witness: Yes.

By Mr. Morken:

Q. I thought that your total business was four loads a month, counting both Grant County and St. Cloud?

Exam. Roberts: We will let the record speak for itself on that. I think he said two to four loads out of Grant County.

By Mr. Morken:

Q. Do you know if you do all of Mr. Hunter's hauling out of the Grant County area?

[fol. 251] A. He hauls a considerable amount himself. He has three trucks of his own.

Q. How many trucks does it take you to take care of that, say, two loads a month out of Grant County?

A. How many trucks does it take?

Q. Yes.

A. It would take two trucks.

Q. Is the turn-around time on one truck as much as thirty days in your business?

A. No.

Q. Do you mean by that that if the two loads came at the same tome that it would take two trucks?

A. Yes.

Q. But if one dame on the first day of the month and one on the 15th day of the month, would you be able to handle it with one truck?

A. Yes.

Q. How many trucks, then, have you operating out of Grant County a month?

A. Approximately ten.

Q. Ten a month.

A. Yes.

Q. To all points?

A. Yes.

Q. Do you haul it from Grant County to St. Cloud and [fol. 252] consolidate it with other loads?

A. Yes.

Q. The point of your equipment not being fully occupied out except in the peak season, that is a rather common thing with motor carriers, is it not, in that they endeavor to maintain enough equipment to take care of the peaks as well as having equipment idle——

A. (Interrupting) We keep our trucks busy, the whole bunch of them, for better than eight months last year. Then we had a slack season of a couple of months in the season, and six weeks, now, probably.

Q. Just what do you do to advertise and hold your service out to the various people that would want to get a hold of you?

A. Most generally the monument salesmen on the road arrange for these loads and consolidate them, and make arrangements for consolidation.

Q. You are speaking of salesmen who work for the Royal Granite Company or the Cold Springs Company?

A. That is right.

Q. How do you suppos they didn't knew about your service to Missouri when it was requested by Mr. Stevenson?

A. I didn't get that authority until last fall.

Q. When last fall?

A. December.

Q. How did you get it then?

[fol. 253] A. Through a hearing.

Q. You proved a new certificate, you did not purchase one?

A. No.

Q. Have you hauled anything into Missouri?

Mr. Coyne: From where?

By Mr. Morken:

Q. Well, have you solicited any business in Missouri from Grant County?

A. Yes, we have. The manufacturers in Milbank both have our tariff which gives the tariff out of Milbank into Missouri.

Q. Has your solicitation, then, been limited to the manufacturers and their salesmen?

A. That is right.

Q. Did you ever think of sitting down and writing a letter to some of these monument dealers?

A. Oh, I have thought of it, but then you start trying to pick out monument dealers in twenty-five percent of the U. S., it is a pretty hard thing to do, and a good many of those monument dealers buy in small lots, and unless the salesman consolidates a load, it would be impractical.

Q. In other words, it would be impractical for your truck operation to solicit these small dealers?

A. For any truck operation.

Q. Do I understand that you have been hauling from Vermont? A. We have hauled two loads from Vermont since the first of the year.

[fol. 254] Q. When did you think you got that authority?

A. Last December.

Q. Who supported your application?

A. Glen Morgan.

Q. The I. C. C. practioneer handled the matter for you?

A. Yes, sir.

Q. Were there any Barre County shippers there that supported your application?

A. No.

Q. Did you have any independent jobbers in this area, the states that you thought you had authority to?

A. I just had the granite manufacturers from St. Cloud.

Exam. Roberts: Was your sub 3 application decided before your lead number? I notice that your sub No. 3 application is a certificate dated February 20, 1951, and your lead number is December 6, 1951.

Mr. Coyne: May it please the examiner, I think the lead number is explained on the second sheet there. That is what was left of an assignment of a portion of it to a Mr. Radkee and that is why it has the date of 6 December, 1951, and actually those rights were secured, some of them, in 1943.

Exam. Roberts: Continue.

By Mr. Morken:

Q. Do I understand that as of now you will discontinue any hauling from Vermont back to the midwest? A. Until I find out what the scoop is on it.

[fol. 255] Q. The support that you had in that hearing, did I understand that you had manufacturers from St. Cloud?

A. And Milbank.

Q. And they wanted you to move granite from Barre, that area, to St. Cloud and to Milbank?

A. Yes.

Exam. Roberts: Was that portion of your application denied then, do you know?

The Witness: I don't know.

Exam. Roberts: Did you get a report?

The Witness: When it was issued they corrected it and recorrected it two or three times.

By Mr. Morken:

Q. Then, do I understand that if that authority was granted you would haul from Vermont back to St. Cloud or back to Grant County, South Dakota, and then on your existing authority you would haul it, say, out to Oklahoma as you purport to show on this exhibit?

Exam. Roberts: You mean by that—this is sort of confused.

By Mr. Morken:

Q. Did you think you proved a case and were granted a certificate to haul from Vermont to Oklahoma?

A. Yes.

Q. By the testimony of a witness that wanted granite from Vermont to St. Cloud?

A. A salesman there was a witness for me at that time.

Exam. Roberts: I think these certificates will speak for [fol. 256] themselves, Mr. Morken.

By Mr. Morken:

Q. One more question, Mr. Dingman. As I understand it, you are hauling about ten loads a month at the present time out of Grant County?

A. Yes.

Q. To all of the states which you have authority, some place between two and four of those loads go to the five eastern states and the District of Columbia, your business is profitable?

Exam. Roberts: Is that one question?

By Mr. Morken:

Q. All right, that is a proper summary so far?

A. Yes, sir.

Q. Your business is profitable, is that correct?

A. Yes, sir.

Q. You are not afraid of competition?

A. No, sir.

Q. And yet if Mr. Schaffer is granted this authority to haul for a shipper for whom you are not now hauling he will so seriously jeopardize your business that you will have to curtail your business?

A. It will curtail it some, surely.

Q. And will it curtail it to an extent that it will affect present service that the shippers are now receiving from the Grant County area, South Dakota?

A. Oh, there is a question there on the more trucks you got on the road, the better service you can get.

[fol. 257] Q. If you don't haul it, Mr. Schaffer will, correct, so far as the public is concerned?

Exam. Roberts: Wait a minute.

By Mr. Morken:

Q. You said the more trucks on the road, the better service the people will get?

A. The better service I can give.

Mr. Coyne: Meaning the more trucks that he has available.

By Mr. Morken:

Q. And the same would be true for Mr. Schaffer, would it not?

A. He should be able to give better service, too, with more trucks.

Q. And with the granting of this authority he would be able to give his shipper that you are not now servicing better service?

A. The Dakota Granite Company would probably be hauling it in some other area if Mr. Schaffer did not have his authority.

Q. You just got through saying that they are hauling it in there now on their own trucks. In other words, the movements that we seek to haul from Grant County to the states is now going by private truck, is that your statement?

A. State it again and I will tell you.

Q. The movement that we seek to haul from Grant County, South Dakota, into these eastern states is now going into these states by Dakota's private truck?

A. Either theirs or mine.

Q. You are hauling for Dakota in these states?

[fol. 258] A. We have hauled some for them, yes.

Q. How long ago?

A. We haven't hauled any this spring for them.

Q. It is my recollection that Mr. Stengel testified that he has not used your service for almost two years?

A. Mr. Stengel came out of college a year ago this June, and Mr. Jergensor was replaced by him, and up until that

time we did all the hauling for the Dakota Granite Company.

Q. I gather the termination of your service was no reflection on you, but it was strictly a matter of rates?

A. That is right.

Q. Despite the fact that it took them two weeks to get merchandise from you?

A. That is a misstatement.

Q. You don't have any records with you?

A. That would be on the dispatching table, and usually their telephone calls come in, and we are going to have a load next week for them, and that is the way that dispatching is done.

Q. Since the first of the year the movement from Dakota Transfer have been going into these eastern states in their own trucks?

A. Yes, sir.

Q. And whether or not this service is granted, that movement will probably continue?

A. I don't know that.

[fol. 259] Q. But at least as far as Mr. Schaffer making the haul, he will not take any business that you have enjoyed this year?

A. Not that I have enjoyed this year.

Q. And there will be no added equipment on the highways, no more trucks on the highways?

A. That I don't know.

Q. But it will probably bring under regulations a haul that is now moving by private carriage?

A. I don't know that.

Q. I gather you believe that there is a real need for a motor carrier service from Vermont to the midwestern area and that there is now no motor carrier service available to render that service?

A. That is correct.

Q. That is to haul granite?

A. That is correct, that is all that is involved.

Q. Now, what is the difference between the need of the Vermont people using Mr. Schaffer to this midwestern area and being able to have those same trucks loaded in Grant County so that we can get back to that area profitably? What is wrong with that movement?

Mr. Coyne: I don't follow that.

Mr. Morken: The witness stated that there is a real need to haul from Vermont to Oklahoma. Is there anything wrong with loading that?

[fol. 260] Exam. Roberts: I don't think this witness is the one to decide on that, he is not a shipper.

Mr. Coyne: I object as it is improper examination.

Exam. Roberts: Objection sustained.

Redirect examination.

By Mr. Coyne:

Q. Mr. Dingman, if the Dakota Granite Company, which is now hauling some of its own granite from Grant County, South Dakota, to points in Vermont, Massachusetts, Connecticut, Maryland, and the District of Columbia, should see fit to discontinue that particular hauling with their own trucks, you would be in a position to haul that at the present time, is that correct?

A. Yes, sir.

Q. If they ever discontinue that hauling do you consider that desirable traffic?

Q. Yes.

Q. Would you like to have that traffic, or do you believe the ICC should authorize Mr. Schaffer so that he may put his lesser rates there?

A. I would like to have it.

Q. And you hold yourself out as being able and willing to handle it?

A. Yes.

Q. And you hold yourself out as being able and willing to handle such amount as they may not want to haul them-

[fol. 261] selves, as testified by Mr. Stengel?

A. Yes.

Q. And you desire that you do haul for other shippers at the same time?

A. Yes.

Mr. Coyne: That is all.

Exam. Roberts: You are excused.

(Witness excused.)

Mr. Coyne: I offer Exhibits Nos. 10, 11, 12, and 13.

Mr. Morken: I have no objection.

Exam. Roberts: Exhibits Nos. 10, 11, and 13 will be received, and Exhibit 12 will be rejected.

(Intervenor's Exhibits Nos. 10, 11 and 13, Witness Dingman, were received in evidence.)

Mr. Morken: If the Examiner please, I would like to offer my own Exhibit 12 as my exhibit, and I think that I can explain my position. I think that I can argue that the motor carrier admits——

Exam. Roberts: I am sorry, but the exhibit has been rejected.

Is there any further evidence in this case?

Mr. Cronon: I will call Mr. Olson.

R. M. Olson was sworn and testified as follows:

Direct examination.

[fol. 262] By Mr. Cronon:

Q. Will you state your name?

A. R. M. Olson.

Q. By whom are you employed?

A. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Illinois.

Q. What is your position?

A. Commerce assistant.

Q. What are your duties?

A. My duties are to handle matters before the I. C. C. and state regulatory body.

Q. Motor carriers?

A. Motor carriers and formal cases involving rates.

Q. Do you have with you a map of the Milwaukee System?

A. Yes, I do.

(Intervenor's Exhibit No. 14, Witness Olson, was marked for identification.)

Q. Is that the one that has been marked as No. 14 for identification?

A. Yes, it is.
Q. Are the lines of the Milwaukee shown there in red?
A. They are.
Q. Have you circled Milbank, South Dakota?
A. Yes, I have in black.
Q. And you have also circled Chicago, Illinois, right?
A. In blue.

[fol. 263] Mr. Cronon: I will offer Exhibit 14.
Mr. Morken: No objection.
Exam. Roberts: It will be received.

(Intervenor's Exhibit No. 14, Witness Olson, was received in evidence.)

By Mr. Cronon:

Q. Is Milbank on the main line of the Milwaukee?
A. Yes, it is.
Q. Is there direct service into Chicago, Illinois?
A. Yes.
Q. And does the Milwaukee interchange with all other Class I railroads in the United States?
A. Yes, we interchange with all Class I railroads with which we have interchange connections, we interchange with them with terminal lines.
Q. Now, you heard the witnesses today, did you not?
A. Yes, I did.
Q. One of them was from St. Paul. I take it you have direct service from Milbank to St. Paul?
A. We do.
Q. Another one was from Hutchinson, Kansas. Do you interchange freight with lines serving Hutchinson, Kansas?
A. Yes.
Q. How about Fremont, Nebraska?
A. We do that at Omaha.
Q. And Moberly, Missouri?
[fol. 264] A. That would be Kansas City.
Q. And Aberdeen is on your line?
A. That would be local.

Exam. Roberts: Are you speaking of operations originating in Milbank?

Mr. Cronon: Well, I was then, but I am going to cover the other end of it.

Exam. Roberts: I think these witnesses expressed their desire for service out of Barre, Vermont, rather than Milbank.

Mr. Morken: That is my understanding.

By Mr. Cronon:

Q. On shipments originating in Barre, Vermont, do you interchange with lines serving the Barre area and its connecting lines?

A. Yes, we do in Chicago.

Q. Do you have a rail freight service into Milbank?

A. Yes, sir.

Mr. Cronon: That is all.

Mr. Morken: No questions.

Exam. Roberts: You may be excused.

(Witness excused.)

Exam. Roberts: Is there any further evidence at this time?

Mr. Cronon: I will call Mr. Bushek.

E. J. Bushek was sworn and testified as follows:

Direct examination.

[fol. 265] By Mr. Cronon:

Q. Will you state your name?

A. E. J. Bushek.

Mr. Cronon: Mr. Examiner, this witness has a prepared statement, and I understand that counsel for the other parties have no objection to his reading it into the record.

Before doing so, I would like to have the reporter mark the exhibits which are referred to.

Exam. Roberts: Is there any objection to this statement?

Mr. Morken: No objection.

Exam. Roberts: It will be written in the record as testimony.

(Intervenor's Exhibits Nos. 15 to 20, inclusive, Witness Bushek, were marked for identification.)

The Witness: My name is E. J. Bushek. I am employed by the Texas and New Orleans Railroad Company as Assistant Superintendent of Transportation with headquarters in Houston, Texas, which position I have held since April 9, 1951. Prior to that date my railroad experience includes approximately thirty-two years with the Texas and New Orleans Railroad Company in the Operating Department. I began work as a yard clerk in 1920, and since that time have held various positions as Division Agent, Assistant Chief Clerk to Division Superintendent, and Inspector of Transportation. At one time or another I have been in personal contact with train operations over all of the railroad operated by the Texas and New Orleans Railroad [fol. 266] Company. Included in the duties assigned to me as Assistant Superintendent of Transportation is the investigation and handling of motor carrier applications proposing competitive service. I represent the General Manager in this particular, and am authorized to call on other departments of the railroad for various information needed to describe our position in any case.

As I understand it the applicant in this case is seeking authority to transport granite, manufactured and rough, from points in Grant County, South Dakota, to points in Texas, Louisiana, and several other states. Also granite, manufactured and rough, and building stone, from points in Vermont to points in Texas and Louisiana and several other states. We are primarily concerned about the service to points in Texas and Louisiana.

Our railroad interchanges with some thirteen Class I railroads and their subsidiaries that serve or connect with railroads serving South Dakota and Vermont. We operate at least two regular trains daily to all principal points on our line. These trains are presently operating on an average of ninety per cent on time. In addition to the train service, the T and N. O. Railroad offers a supplemental truck service performed by the Southern Pacific Transport Company, a wholly owned subsidiary.

It is our position that the service now offered by our railroad and other railroads and common carrier truck

lines in Texas and Louisiana is entirely adequate to meet present transportation needs. In support of this position, [fol. 267] your attention is invited to the following exhibits:

A map of the T. and N. O. Railroad in Texas and Louisiana, showing territory and principal stations served, mileage between principal cities, connections with other railroads, and so forth.

A map of the Southern Pacific Transport Company showing territory served in Texas and Louisiana.

A report showing mileages, number of stations and agencies in Texas.

A report showing mileages, number of stations and agencies in Louisiana.

A report showing T. and N. O. ownership of locomotives, December 31, 1945, and May 31, 1952.

A statement showing ownership of freight cars and aggregate capacity owned by T. and N. O. as of December 1, 1944, and April 1, 1952.

By Mr. Cronon:

Q. Mr. Bushek, in your testimony you referred to six exhibits. Is the map of the Texas and Illinois Railroad the one which has been marked as No. 15?

A. That is the map of the Texas and Illinois Railroad.

Q. And is the map of the Southern Pacific Transport Company the one that is marked as No. 16?

A. That is right.

Q. And is the report showing mileages and number of stations and agencies in Texas the one marked as No. 17? [fol. 268] A. That is right.

Q. And the report showing mileages and stations and agencies of the T. and N. O. Railroad in Louisiana is the statement marked as No. 18?

A. No. 18 is the mileage and stations and agencies in Louisiana.

Q. And is No. 19 the report showing the number, type and tractive effort of locomotives and freight service owned by the Texas and New Orleans Railroad?

A. That is No. 19.

Q. And is No. 20 the statement showing the number of

freight cars and aggregate capacity owned by the T. and N. O. Railroad?

A. That is No. 20.

Mr. Cronon: We will offer Exhibits 15 to 20, inclusive.

Mr. Morken: No objection.

Exam. Roberts: They will be received in evidence as Intervenor's Exhibits Nos. 15, 16, 17, 18, 19, and 20.

(Intervenor's Exhibits Nos. 15 to 20, inclusive, Witness Bushek, were received in evidence.)

Mr. Cronon: We rest, subject to the possibility of a further hearing.

Exam. Roberts: Gentlemen, as previously indicated, your request for a further hearing at this time is denied, and I presume you gentlemen do not desire to file briefs?

Mr. Morken: That is correct.

[fol. 269] Mr. Cronon: That is correct.

Exam. Roberts: If there is no further evidence at this time, the hearing is now closed.

(Whereupon, at 6:30 p. m., the hearing in the above-entitled matter was closed on Friday, June 13, 1952.)

[fol. 272]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. MC-93529 (Sub. 2)

In the Matter of

A. W. SCHAFFER, d.b.a. SCHAFFER TRANSPORTATION COMPANY, Revillo, South Dakota

Stenographic Notes

Washington, D. C., Room E, Tuesday, December 2, 1952.

Met, pursuant to notice, at 9:30 a. m.

BEFORE:

RICHARD H. ROBERTS, Examiner.

APPEARANCES:

Donald A. Morken, 100 First Soo Line Building, Minneapolis 2, Minnesota, appearing for applicant.

James G. Lane, 226 South Station, Boston, Massachusetts, appearing for Eastern Railroads, (except Chesapeake and Ohio Railway), as protestants.

Claude G. Metzler, 888 Union Station, Chicago 6, Illinois, appearing for Class I Western Rail Carriers, as intervenors in opposition.

[fol. 274] PROCEEDINGS

Exam. Roberts: Come to order, please, gentlemen. There will be no smoking in the hearing room at any time.

The Interstate Commerce Commission has set for further hearing at this time and place Docket No. MC–93529, Sub No. 2, application of A. W. Schaffer of Revillo, South Dakota, doing business as Schaffer Transportation Company.

The issues in this case were previously stated at the prior hearing which was held at St. Paul, Minnesota on Friday, June 13, 1952, and need not be repeated at this time.

Also, any appearances at the prior hearing need not be repeated. Are there any additional appearances at this time?

Mr. Metzler: Claude G. Metzler, 888 Union Station, Chicago 6, Illinois, appearing for Class I Western Rail Carriers as intervenors in opposition. I am an attorney and admitted to practice before the Interstate Commerce Commission.

Mr. Lane: James G. Lane, 226 South Station, Boston, Massachusetts, appearing on behalf of the Eastern Railroads (except the Chesapeake and Ohio Railway) as protestants. I am an attorney at law and admitted to practice before the Interstate Commerce Commission.

Exam. Roberts: Are there any further appearances? Hearing none, we will proceed with the case. Mr. Morken?

Mr. Morken: At this time I will recall Mr. Schaffer.

Exam. Roberts: Mr. Schaffer, you were previously sworn [fol 275] at the prior hearing, were you not, sir?

Mr. Schaffer: Yes sir.

AUBREY WILLARD SCHAFFER having previously been sworn, testified further as follows:

Direct examination.

By Mr. Morken:

Q. You are the applicant and the same Mr. Schaffer who testified at this hearing in St. Paul, Minnesota, in June of this year?

A. Yes.

Q. At that time you offered Exhibit No. 6 which was an equipment list?

A. Yes.

Q. Has there been any change in that equipment since the hearing?

A. Yes, there have been two tractor trailer units replaced by new equipment.

Q. And that is the only change?

A. Yes.

Q. You are still operating the same number of vehicles that you were operating at that time?

A. Yes.

Q. You also offered Exhibit No. 7 which was the balance sheet and an operating statement for your various operations. That was for the year ending December 31, 1951. Do you recall that exhibit?

[fol. 276] A. Yes.

Q. Has there been a more recent financial statement prepared since that time?

A. No, not a financial statement. Our auditor gave us figures on the Federal income tax return. He sends in a quarterly report and he makes just one yearly financial statement, and that won't be made until some time in the forepart of January closing the fiscal year.

Q. As far as your balance sheet is concerned, that is your total assets and total liabilities, has there been any substantial change in that picture since December 31, 1951?

A. Yes sir, this year has been a much better year than 1951 for us. In fact, it has been a very good year in our operations and shows a considerable more net profit.

Q. That is for your operating statement.

A. Yes.

Q. As far as it stands now, do you have an approximate idea of how your operating picture is for the year to date, or what it will be at the end of this year?

A. Well, if the month of December, we assume, will be an average month, the net operating profit will show approximately $12,000.

Q. And with that net operating profit there would be a proportionate change in your assets and liabilities, is that right?

A. Yes.

Q. Otherwise, the situation for you is about the same, if [fol. 277] not the same as it was when you testified in June?

A. Yes.

Mr. Morken: That is all I have at this time with this witness.

Exam. Roberts: Cross-examination, Mr. Lane.

Cross-examination.

By Mr. Lane:

Q. May I look at the docket, please? In reading the transcript of the previous hearing Mr. Schaffer, I gather that you intend to pick up granite if authority is issued by the Interstate Commerce Commission in the Barre, Vermont area for transportation to the sixteen destination states named in your application.

A. If the permit is granted, yes.

Exam. Roberts: May I ask, Mr. Lane, does your interest in this case involve only the operations originating in Vermont?

Mr. Lane: That is right, sir. Did you say was my interest restricted to that?

Exam. Roberts: Yes.

Mr. Lane: No. I am interested in both directions.

Exam. Roberts: From the Grant County area out of South Dakota?

Mr. Lane: My questioning primarily will be directed to the outbound movement from Vermont.

Mr. Morken: If the record can reflect this, in requesting this authority I stated in the letters that went to the differ-

[fol. 278] ent parties that as far as the applicant was concerned we would only offer testimony relative to the movement of granite from the Vermont area back. We would not offer any additional testimony as far as South Dakota origin to the additional states that were requested.

Exam. Roberts: I think that is a matter of record at the present time. Proceed.

By Mr. Lane:

Q. Revillo, South Dakota is in Grant County, is it not?

A. Yes.

Q. I read over the transcript of the previous hearing and I don't believe I noted any testimony with respect to the highway mileage. Do you know approximately what the highway mileage is from Barre, Vermont to Revillo, South Dakota of any point in Grant County, South Dakota?

A. I would say approximately 1,600 miles.

Q. Your tractors have the conventional cabs, do they not?

A. That is right.

Q. No sleeper cabs?

A. No sleeper cabs.

Q. Under the proposed method of operation, will your drivers operate so many hours and then put up over night?

A. Yes.

Q. At various places?

A. Yes.

[fol. 279] Q. Taking a typical example and a truckload of granite leaving Barre, Vermont on Monday, will you tell the Examiner how the driver would operate, where he would go during the first day's travel and the second day's travel and so on.

Mr. Morken: To what destination?

By Mr. Lane:

Q. Let us take Grant County, South Dakota as a typical destination.

A. It would depend largely on the road conditions and the weather conditions and also the distance. You did say Grant County?

Q. Yes, let us take Grant County as a typical destination.

A. Well, if he left Barre, Vermont on a Monday morning, he would drive—I think the maximum hours set up by the Interstate Commerce Commission is ten hours in any day and our drivers will only drive eight hours, and then we expect them to have the rest and depending upon the road conditions largely will determine the amount of miles he may travel. His tie-up for rest periods would be at intermittent places because there is no given point, no set point, as to where they must take rest, must tie-up.

Q. There are no established relay stations?

A. No; no established relay stations other than Chicago, and if it requires three days to get there, it is three days. If it requires two and one half days, it is two and one half days.

Q. How many days on an average would you expect the [fol. 280] driver to consume from Barre, Vermont to Grant County, South Dakota?

A. It would vary, but I would say approximately six days.

Q. Do you know what your operating cost is per mile?

A. It varies considerably.

Q. Under those you propose to use in this service from the Barre, Vermont area to the destination states here involved, what would the operating cost be?

A. Well, that would vary greatly with the size of the load, also the weather conditions.

Q. On the outbound movement from Barre, Vermont to these destination states in every instance you would use tractor trailer units, would you not?

A. That is right.

Q. Did you make any study to determine whether or not you could operate at a profit from Barre, Vermont to these sixteen destination states?

A. Yes sir.

Q. And as a result of that study, did you arrive at some average cost per mile?

A. Well, we took the average cost of our now existing authority and this would be practically the same movement, only in reverse, the movement that we now have from Grant

County, South Dakota to New York and Pennsylvania on the authority that we now have, it would run practically the same.

Q. How much is that, Mr. Schaffer?

[fol. 281] Mr. Morken: Mr. Examiner, at the previous hearings I reread this transcript and we have quite a bit of testimony in there on the question of days, the length of time. He told about the trucks he now has in New York and Pennsylvania, a matter of filling them up and coming back in the other direction and tying it in with this operation. I wonder if this is unnecessary repetition. I don't know what Mr. Lane has definitely in mind. If he thinks the operation is unprofitable, that is Mr. Schaffer's tough luck.

Exam. Roberts: We definitely want to avoid repetition, but I think if Mr. Schaffer would be a little more responsive to the questions here, we could move along further and we won't prolong the interrogation. Continue, Mr. Lane.

By Mr. Lane:

Q. What is the cost of operation per mile on your existing operation?

A. Would you want just the cost of the operation or include the driver, or do you want it broken down separately or grouped together?

Q. I would like to have it all grouped together and then you can break it down separately.

A. Well, the cost of operation would be approximately twelve cents a mile.

Q. And that includes the driver?

A. Yes.

Q. And this is on a tractor trailer unit with the maximum [fol. 282] weight limits on the vehicle and a load of fifty thousand pounds.

A. Do you want the depreciation taken in on the equipment, or do you want the cost of the gasoline and the oil and the driver?

Q. We want the cost of the depreciation and all the factors that enter into the cost of operation.

A. If you take your depreciation and all, I would say approximately sixteen cents a mile.

Q. Does that take in insurance and the driver's wages?

A. Yes.

Q. And his road expense for putting up overnight at these various places?

A. Yes.

Q. You assisted in preparing this application prior to signing it, did you not?

A. Yes.

Q. Why didn't you notify the existing motor carriers who were authorized to transport granite from the Barre, Vermont area to their connecting carriers in the Boston, Massachusetts and Springfield, Massachusetts area?

A. Because we were not in competition with them. I know of no other motor carrier that has the service we are now asking for.

Q. What investigation did you make to determine whether [fol. 283] or not you would be competing with St. Johnsbury Trucking Company?

Mr. Morken: For your information, we have a letter here, and one of the witnesses will testify as to St. Johnsbury. They have no interest in the proceeding and cannot provide the service.

Mr. Lane: I want to know how he complied with the Administrative Procedure Act with respect to notice.

The Witness: I checked with the local District Director of the Interstate Commerce Commission; I checked with my attorney; I checked with Mr. Perry Moore and Mr. Morken checked with the Commission also on prevailing means of service that I could through the manufacturers at Barre and all means that I knew possibly where I could check.

By Mr. Lane:

Q. Did you check with the District Director of the Bureau of Motor Vehicles of the Interstate Commerce Commission at Boston, Massachusetts?

Mr. Morken: I object to the question as being immaterial.

Exam. Roberts: Overruled. He may answer.

The Witness: I did not.

By Mr. Lane:

Q. Did you notify any motor carrier domiciled in the New England area with respect to your application?

A. I would have reference to my attorney on that.

Mr. Morken: You didn't check with anyone, did you?

The Witness: No.

Mr. Morken: Just answer no, you didn't check with anyone.

[fol. 284] By Mr. Lane:

Q. What makes you think you could conduct this operation at a profit from Barre, Vermont, for example, to Dallas, Texas?

A. Well, it could be constructed just as well from Barre, Vermont to Dallas, Texas as it would be from Grant County, South Dakota to New York City.

Q. Do you know whether or not you would get business from Barre, Vermont to Dallas, Texas, any business?

A. I assume that I would.

Q. Do you know?

A. Only what dealers and manufacturers have requested.

Q. Do you know how the present movement of granite is being transported from Vermont to points in the State of Texas?

A. Some of them by——

Mr. Morken: Answer it yes or no.

By Mr. Lane:

Q. Do you know?

A. Yes.

Q. How is it transported?

A. By rail.

Q. You have definite personal knowledge?

A. Yes.

Q. Did you make any investigation of the service now being rendered by the rail carriers in the transportation of granite from Vermont to points in the State of Texas?

A. What was that question?

[fol. 285] Q. Did you make any investigation of the ser-

vice now being rendered in the transportation of granite from points in Vermont to points in Texas by the rail carriers?

A. Yes sir.

Q. What is the service for example, from Barre, Vermont to Dallas, Texas?

Mr. Morken: I object to the question as having an improper foundation.

Exam. Roberts: I will overrule the objection. You may answer.

The Witness: Well, the information I received from my investigation.

By Mr. Lane:

Q. Just a minute, please. I want your personal knowledge, not something that somebody told you. I want to find out from your own personal knowledge.

A. Well, my own personal knowledge, I find that carload shipments were satisfactory and less than carload shipments were not satisfactory.

Q. Do you know whether at any time during the past two years there were any carload shipments or any less than carload shipments from the Barre, Vermont area to any point in the State of Texas?

A. Not offhand, I couldn't say.

Q. If I asked the same question with respect to the other destination states, would your answer be the same?

[fol. 286] A. I would say no on that.

Q. Well, with regard to what states would you say you had no knowledge, of the sixteen.

A. I don't know just what you mean on that question.

Q. Have you any personal knowledge of any actual movement to each one of these sixteen destination states, with the exception of Texas, concerning which you have already testified?

A. Yes.

Q. Let us take the State of Wyoming. Do you know whether or not there are any shipments from the Barre, Vermont area to the Wyoming area during the past two years?

Mr. Morken: I object to the question as having an improper foundation.

Exam. Roberts: I think we are going into something that can be brought out by shipper testimony than by applicant testimony. I will permit the applicant to answer the question but I don't want to dwell on that too much on that line of testimony.

Mr. Lane: I agree with that, but I believe, with respect to his answer regarding Texas, he has not made any study of the movements.

Mr. Morken: And if he hasn't, what difference does it make?

Exam. Roberts: Just a minute, gentlemen. I don't want to go into any detailed questioning of the need for service [fol. 287] from the applicant witness.

Mr. Lane: Actually I am not trying to develop the need for service as to whether or not he knows what he is up against in regard to the application.

Exam. Roberts: Perhaps you can reframe the question.

Mr. Lane: I will, sir.

By Mr. Lane:

Q. Mr. Schaffer, did you make any investigation as to whether or not you could secure traffic and conduct a profitable operation from the Barre, Vermont area, for example, to points in the State of Wyoming?

A. Well, not particularly Wyoming, but to different states in the area we did have correspondence with a dealer at Sheridan, Wyoming and we figured out the revenue approximately what it would be.

Q. What would the revenue be to Sheridan, Wyoming from Barre, Vermont?

A. I haven't got the figures before me. I haven't got a copy of them. I don't remember offhand. It was figured in our office and gone over by our bookkeeper and as to the exact figures, I couldn't give them to you.

Q. How was the figure? Was it against the rail rates?

A. Yes. It was figured in comparison with rail rates.

Q. Rail less than carload?

A. Rail less than carload and also carload shipments.

Q. To get the business you would have to do better than [fol. 288] rail rates, at least less than carload.

A. No, I didn't say that.

Q. Coming back to your destination territory, to what area do you expect to opprate substantially in the sixteen states?

A. To what area, did you say?

Q. Yes, what part of the sixteen states do you expect to operate to?

A. Any one or all of them.

Q. But you don't know where the traffic will develop, is that true?

A. Well, it will develop in all of them because there is movement into all of those states applied for.

Mr. Lane: I think that is all I have of this witness at this time, Mr. Examiner.

I reserve our rights, I wish to raise the question of compliance with the Administrative Procedure Act in regard to notice. It is obvious with regard to examination of the docket that there are numerous motor carriers authorized to perform transportation to the territory here involved through interline service who were not notified of this hearing.

Mr. Morken: May I ask Mr. Lane one question in regard to that?

Exam. Roberts: Yes.

Mr. Morken: Are you claiming, as far as any of your clients or any of the people that you claim to represent, that [fol. 289] you did not get proper notice of this hearing?

Mr. Lane: In so far as rail carriers are concerned.

Mr. Morken: In so far as you or your association or your clients, and I don't know what your association with them is, but are you claiming that you did not get proper notice?

Mr. Lane: I am not claiming lack of notice, but I am claiming that the applicant did not furnish proper notice in compliance with the Administrative Procedure Act.

Mr. Morken: You are not claiming that you didn't get notice?

Mr. Lane: No, not me.

Exam. Roberts: Are there any further questions?
Mr. Metzler: Yes, Mr. Examiner.

By Mr. Metzler:

Q. In reference to the question of sixteen cents per mile, are you going to introduce a late filed exhibit showing those actual costs?
A. No.
Q. It is more or less just your guess or wish or speculation that the cost of the business is about sixteen cents per mile?
A. It is taken from the actual records in the office now existing.
Q. As far as the proposed movements are concerned, it is speculative and conjectural?

Mr. Morken: Do I understand that question correctly? May I ask the witness if he understands it?
[fol. 290] The Witness: He said, as far as I understand, that the business that we expect to get, is that the question?
Mr. Morken: Will you read the question please, Mr. Reporter?

(The last question was read by the reporter.)

Exam. Roberts: You can't tell what the operating costs will be on any operation you have never conducted, is that right?
The Witness: That is right.
Mr. Metzler: I used the word "proposed".
Exam. Roberts: I think this witness was confused on your question. Proceed.

By Mr. Metzler:

Q. Does that include deadhead mileage, that sixteen cent figure?
A. Yes, it includes deadhead mileage.
Q. Does that mean, say from Pennsylvania or New York or even farther west up to Vermont you wouldn't be getting any profitable mileage?

Mr. Morken: Any what?

Mr. Metzler: Is the deadheading from Pennsylvania up to Vermont then?

Mr. Lane: Is the cost of that mileage added to the deadhead mileage?

Exam. Roberts: Address your questions to the witness. Do you understand the question?

[fol. 291] The Witness: I don't quite understand what you are arriving at there.

By Mr. Metzler:

Q. You say there would be some deadhead mileage figured into it, and I was wondering to what extent or how much mileage that would be.

Exam. Roberts: In other words, between what states would the deadhead mileage occur?

The Witness: That would be very hard to say.

Exam. Roberts: How do you propose to perform operations up to Barre, Vermont to originate a load of granite from that point westbound?

The Witness: Yes.

Exam. Roberts: How do you propose to do that?

The Witness: Our proposal is that under the present authority that we have to truck granite from the Grant County area in South Dakota into the East, and using the Barre, Vermont granite as a return load.

Exam. Roberts: What counsel is trying to find out is how much deadhead mileage would be involved.

The Witness: It would vary from load to load.

Exam. Roberts: Let us give a specific instance. You don't seem to be giving us direct responses.

The Witness: I don't quite understand what he means.

Exam. Roberts: What is the furthest point in the East which you are now authorized to serve out of Grant County, [fol. 292] South Dakota.

The Witness: New York City or possibly Albany, New York.

Exam. Roberts: And you would deadhead from those points to Barre, Vermont?

The Witness: That is right.

Exam. Roberts: To pick up a load?

The Witness: Yes.

Exam. Roberts: How many miles is that?

The Witness: Two hundred to two hundred and fifty, I would say, possibly one hundred and fifty in some cases.

By Mr. Metzler:

Q. You brought your financial statements and information, you said, and I was wondering what was the most recent date when one of your drivers was arrested for overloading or speeding or something like that.

A. I don't know that there has been any violations in overloading or speeding in the past year.

Q. Weight shifting?

A. No, no weight shifting.

Q. I don't recall whether or not questions brought out at the St. Paul hearing this matter, but how much of your equipment is going to be devoted to these proposed movements that you are seeking authority for?

A. All of the equipment, if it is requested.

Exam. Roberts: Can you give us a definite number of tractor trailer units?

[fol. 293] The Witness: Well, there would be, at the present time I believe there are seven or eight tractor trailer units, is it not?

Examiner Roberts: That will be used in your proposed service?

The Witness: Yes, there are eight tractor trailer units.

By Mr. Metxler:

Q. In other words, with substantially the same equipment you are planning to serve literally the whole country.

A. It depends on the need for the equipment. If it is required to need more equipment, we will then put on more equipment.

Mr. Metzler: That is all.

Exam. Roberts: Is there any redirect examination?

Redirect examination.

By Mr. Morken:

Q. Do I recall your testimony correctly that at the previous hearing you testified that all of your equipment as far as its going to the East would be available to backhaul from that area in connection with your existing operation?

A. Yes.

Q. And as you contemplate things now, if this authority is granted, you will station three trucks at the Barre, Vermont area with a full tiime time company employee there and it is your plan to start the operation if it is authorized [fol. 294] with three additional trucks, or would it be three of those eight?

Mr. Lane: Objection. Who is testifying?

Mr. Morken: I am refreshing his recollection.

By Mr. Morken:

Q. Those three trucks that you testified that you were going to put there are three of those eight, or will it be three additional pieces?

A. No, it will be three new pieces of equipment.

Mr. Morken: That is all.

Recross-examination.

By Mr. Lane:

Q. These three units that will be stationed at Barre, Vermont will be used to haul granite to any point in the sixteen destination states, is that correct?

A. Yes.

Q. When the Examiner asked you about backhaul, you mentioned that the same vehicles might be dispatched eastward to a point such as Albany, New York and then deadheaded to Barre, Vermont, is that correct?

A. No, it will be loaded in South Dakota and returned back to the East.

Q. Yes, with building stone and then deadhead to Barre, Vermont, is that correct?

A. Yes.

Q. And you gave the Examiner or Mr. Metzler an example of Albany, New York as being a typical point where you would deadhead to Barre, Vermont. Will you tell the [fol. 295] Examiner what would be the most distant point in the East where you would have to deadhead to Barre, Vermont?

A. The most distant point I would probably deadhead from would be some spot in the State of Ohio.

Q. That would be around seven hundred or eight hundred miles, would it not?

A. Probably six hundred miles, but it is not necessarily deadhead either.

Exam. Roberts: Just answer the question propounded to you as to deadhead mileage.

By Mr. Lane:

Q. It is six hundred miles at sixteen cents a mile producing no revenue. Will you tell the Examiner whether the cost of that operation would be added on to the cost of the operation on the outbound shipments from Vermont?

A. It would be divided, I presume.

Mr. Lane: That is all.

Exam. Roberts: Mr. Metzler, do you have any further questions?

Mr. Metzler: Nothing further.

Mr. Morken: I would like to ask another question.

Exam. Roberts: Just a moment, Mr. Morken: We are going around only twice.

Mr. Morken: Well, it is all in the record.

Exam. Roberts: You may be excused.

(Witness excused.)

[fol. 296]. Exam. Roberts: Call your next witness.

Mr. Morken: I call Mr. England.

HEBER ENGLAND was sworn and testified as follows:

Direct examination.

By Mr. Morken:

Q. Will you state your name please?
A. Heber England.
Q. By whom are you employed, Mr. England?
A. Jones Brothers Company, Barre, Vermont.
Q. What is your position with that company?
A. President.
Q. Are you also an owner or part owner of that company?
A. Yes sir.
Q. Will you describe briefly just what Jones Brothers Company is; what they do, where they do business?
A. Jones Brothers Company are located in Barre, Vermont. Their primary business is the manufacturing of granite monuments. We also own a quarry company whose primary business is the quarrying of rough granite and monumental material.
Q. Does your company do business outside of the Barre, Vermont area?
A. It does business in most states in the Union.
Q. Do you market your products under any trade name or advertising name?
A. Our finished monuments are trade-marked under the [fol. 297] name Guardian Memorials.
Q. Are you able to tell us in some way of the size, or by volume or by comparison, the size of your company in this business?
A. You mean as to volume of sales?
Q. Well, first generally, are you one of the larger companies operating in the United States?
A. Yes we are.
Q. Are all of your shipments from Barre, Vermont or the immediate Barre area; that is outbound shipments of granite?
A. Probably ninety percent. The other ten percent would be foreign granite from the Port of Boston.

Exam. Roberts: That wouldn't be involved in this service that the applicant proposes.

The Witness: I don't believe so.

By Mr. Morken:

Q. You are familiar generally with the application and the proposal of Mr. Schaffer to institute a trucking service from Vermont to the sixteen midwestern states, are you not?

A. Yes.

Q. Is your company presently making shipments from this Barre, Vermont area to these sixteen states?

A. Yes we are.

Q. Can you give us the approximate weight in tonnage that your company shipped to these sixteen states last year?

A. Approximately 1,600,000 pounds.

[fol. 298] Mr. Morken: Mr. Examiner, I have for this witness an exhibit, and for my next witness some exhibits and I had a public stenographer make copies of these last night. We have had no opportunity to proof-read them. They do not involve too many numbers or figures, and in offering these I would like it understood that there might possibly be typographical errors, but otherwise they are correct as the witness had them made up.

Mr. Lane: May we go off the record.

Exam. Roberts: Off the record.

(There was a discussion off the record.)

Mr. Morken: May this document be marked for identification as the next exhibit, Mr. Examiner?

Exam. Roberts: That will be identified as Applicant's Exhibit No. 22.

(Applicant's Exhibit No. 22, Witness England, was marked for identification.)

Exam. Roberts: Do you have another exhibit, Mr. Morken?

Mr. Morken: Yes, I would like to have this next document identified with the next number, Mr. Examiner.

Exam. Roberts: The next one will be identified as Applicant's Exhibit No. 23.

(Applicant's Exhibit No. 23, Witness England, was marked for identification.)

By Mr. Morken:

Q. Will you refer to what has been marked as Exhibit No. 22? Can you identify that for us please and tell us [fol. 299] what it is?

A. It is headed List of Dealers, Jones Brothers. This is a list of dealers that we sell to in the territory involved.

Q. You took this list of these dealers from your company records?

A. That is correct.

Q. Are you supplying these people currently and as frequently as they order shipments?

A. We are.

Q. What is your present method of shipping to these people?

A. We ship three ways: In some instances carload; in some instances pool carloads; and in some instances less than carload.

Q. Can you tell me the number of pool carload shipments that you had last year? Does the figure of 117 mean anything?

A. No, the figure 117 is the total dealer list we sell in the territory.

Q. And you don't need to count the others for pool car shipments?

A. I would say there are probably fifty.

Q. Are you using any motor carrier service on these granite shipments at the present time?

A. No, not into the territory under discussion.

Q. Why is that?

[fol. 300] A. To my knowledge there is no carrier service available.

Q. Will you describe to us the existing rail service as far as taking care of your needs, and I have in mind will you testify whether it has been satisfactory or unsatisfactory?

A. We feel that carload shipments are satisfactory. We feel that pool car shipments are not very satisfactory. We feel that less than carload shipments are unsatisfactory.

Q. Why is that? Let us take the less than carload shipment first.

A. The reason for the less than carload shipments as being unsatisfactory is that the length of time involved in

shipment, the complaint on the part of dealers occasionally for damage and the cost of less than carload shipments. There are many small dealers in the country who are not big enough to warrant carload orders. These dealers, because they are handicapped in the length of time involved for less than carload shipment, and because of the cost, are changing their buying habits to centers from which they can get quicker service and because of trucking service, lower rates.

We feel that it is a serious handicap to the granite industry of Vermont.

Q. Do you have truck service from your area to other points in the United States, that is points not involved in this application?

A. Yes, there is truck service in to New York and in to [fol. 301] Pennsylvania.

Q. You are familiar generally then with what a truck can do hauling this granite as compared to what the railroads can do with respect to these less than carload and pool car shipments?

A. Yes I am.

Q. If you will refer to what has been marked for identification as Applicant's Exhibit No. 23, can you identify that for us please? Tell us what it is.

A. This, as you have marked it Exhibit 23, involved the dealers that we have shipped to in pool cars and the list shows the time that the monuments were actually finished at our plants and the length of time that we had to hold, to warehouse them to tie up our money, before they could be shipped. In other words, we had to hold the shipments until the pool car was available, a full car could be gathered.

An examination of this list will show a very serious lull from the time goods are finished to when they are shipped. Not only do we have big sums of money tied up which tend to increase our costs, but the dealer oftentimes, handicapped with these long delays, is very seriously handicapped and his tendency is to again ship to centers where he can get quicker service.

Q. Again returning to this exhibit, first, who prepared this from your company's records? Did you prepare it?

A. This was prepared for me by our shipping clerk from [fol. 302] our records.

Q. At your direction?

A. At my direction.

Q. Do I interpret it correctly where this Lee M. Bogle Company of Minneapolis, Minnesota received three pool cars on the dates specified; one in May of 1951; one in April of 1952; and would he get two cars in April 1952, on April 5, 1952?

A. Yes.

Q. And the product you had for him was finished some time prior to its being shipped, but it had to be held up until there were enough other orders to put into that pool car?

A. Correction, I don't believe there were two cars. I believe those items were finished and shipped in the April 5th car.

Q. There were two different orders but both went in the same car?

A. Yes.

Q. But that was held up, they were held up until there were sufficient other orders from the Minneapolis, Minnesota area to make up a pool car to that area?

A. That is correct.

Mr. Morken: I will offer Exhibits 22 and 23 in evidence.

Exam. Roberts: I will reserve ruling on them at this time until after the conclusion of the cross-examination.

By Mr. Morken:

Q. Do you have with you some exhibits, some actual freight bills and bills of lading that show the speed of [fol. 303] service on less than carload shipments?

A. Yes.

Q. Can you point out and give us the dates and the origin point and the destination of some representative shipments? I don't think you should read them all. You have quite a few there, do you not?

A. Yes, we will take the McFall Monument Company.

Q. Where are they?

A. In the State of Illinois.

Q. Please proceed.

A. Here is the freight bill, No. 6838, way bill 243, date

shipped December 7, 1948 and date delivered December 14, 1948.

Exam. Roberts: Are any of those shipments shown on Exhibit No. 23?

The Witness: I don't believe so, sir.

By Mr. Morken:

Q. If I can ask you, Mr. England——

A. No.

Q. Exhibit No. 23 is just pool car shipments and you are referring to typical examples of less than carload shipments?

A. That is right.

Mr. Lane: Before there is any further interrogation on these bills, I would like to make inquiry as to whether these are the original freight bills and whether these are the delivery receipts accompanying the original document.

Exam. Roberts: I think you can bring that out on cross-[fol. 304] examination.

By Mr. Morken:

Q. I will ask you whether these documents that you are referring to on these less than carload shipments, that is the original freight bill?

A. That is correct, sent back to us by the dealer.

Q. And it shows not only the origin date but the date that it was delivered?

A. Yes.

Q. And that is the information that you are referring to when you read off that one shipment?

A. That is right.

Q. What was the elapsed time on that shipment that you read, number of days?

A. That shipment was one week.

Q. Is that good service or is that slow service?

A. I would call that good service for less than carload.

Mr. Lane: Could I have the way bill date on that and the number.

Mr. Morken: Will you read that, please?

The Witness: The way bill is 521221.

By Mr. Morken:

Q. The originating carrier was who?

A. Originating Barre and Chelsea, but it was the Chicago, Burlington and Quincy.

Exam. Roberts: That was the delivering carrier, the Chicago, Burlington and Quincy.

[fol. 305] The Witness: That is correct. I will have to find that particular one now if he wants it.

Mr. Lane: It will make it that much easier on cross-examination.

The Witness: Yes, I have it here. There is a correction. Freight bill number is 6838.

I have another instance of freight bill No. 6374, way bill No. 1013, date shipped December 26, 1947, date received January 7, 1948.

Another we might look at would be freight bill No. 8240, way bill No. 104844, date shipped June 19, 1947, date delivered June 28, 1947.

I have perhaps another then illustrations to that same dealer, but I have other dealers here.

By Mr. Morken:

Q. For this particular dealer I notice we are back in 1947 and 1948. Did you take all of his shipments for a certain period of time?

A. I am not sure.

Q. Do you have any more examples that are more recent?

A. Boise Monuments and Wilbert Vault Company, freight bill No. 526, way bill No. 461; date shipped December 21, 1951, date delivered January 14, 1952.

Same dealer, freight bill No. 561, way bill No. 46; date shipped January 10, 1952, date delivered January 29, 1952.

Q. Could I ask you this; just looking at those sheets on [fol. 306] which you have the weights, you probably have forty or fifty different bills there, have you not?

A. Twenty-five or thirty.

Q. Can you summarize those generally as far as the average delivery time of the less than carload shipments

from the Vermont area to these points in the Midwest are concerned?

A. They vary from one week to a good two weeks. In some instances, more.

For example, I will give one more. No 512 is the freight bill and the way bill number is 321; shipped on November 15, 1951 and delivered on October 8, 1951.

Mr. Lane: What was the destination of that?

The Witness: That is Boise Monuments and Wilbert Vault Company, Lyons, Iowa.

Exam. Roberts: Is that the same dealer shown on the second page of Exhibit No. 22 at Clinton, Iowa?

The Witness: Yes, that is the same dealer.

Exam. Roberts: At Clinton, Iowa?

The Witness: Yes.

By Mr. Morken:

Q. The last one you read was a little over three weeks?

A. Yes.

Q. And the one you read of December 21, 1951 and delivered January 14, 1952 was a little over three weeks, was it not?

A. Yes.

[fol. 307] Q. Again, is there any average time that your company feels it must allow for delivery on less than carload shipments between Vermont and the Middle West, such as Iowa or Illinois?

A. Well, our business is seasonal and certainly in the spring our business every day counts from a dealer point of view.

Q. When this less than carload rail service is used, are you able to promise or guarantee any delivery time?

A. Not except within a three week period.

Q. Would the availability of a motor carrier service that can make delivery on the 5th or 6th day in Illinois or Iowa be a convenience in your business?

A. Yes it would.

Q. You mentioned in a statement the fact that other companies had motor carrier service into the Midwest that you did not. Do you recall any of them?

A. It is my understanding that there is motor carrier service from the Elkton, Georgia district into the territory under consideration. I understand that service is available from Minnesota into that territory, and it is my contention that the very fact that those two centers have this service is a severe handicap to those of us who are manufacturers in Barre, Vermont.

Q. Are you able to tell us whether or not your company has lost business because of the lack of transportation services in these middle western states?

[fol. 308] A. That has been called to my attention by our full salaried salesmen and an occasional dealer.

Q. Has your company considered instituting its own private truck service?

A. We feel that if we can't get some common carrier, that it is very possible that we will have to go into the trucking business ourselves.

Q. Has your company discussed that proposal or that proposition of private trucks service?

A. Has some company discussed what? I don't quite get your question.

Q. Has it been the subject of discussion in your company, this private truck service?

A. Yes.

Q. It is not something about the future, but it has been under discussion?

A. Yes, it has been under discussion.

Q. If this service is authorized, do you think it will meet your transportation needs for truck service into the Midwest?

A. I believe it would.

Q. If this service is authorized, do you intend to discontinue using the rail service?

A. Not at all. We believe in the railroads, believe they are necessary, and I further believe that a substantial volume of business that is going to other centers would [fol. 309] come to Barre, and actually increase business so far as that is concerned, increase it sufficiently so that the railroads would get more business than they are getting now.

Q. Just how would this truck service increase your overall business?

A. At the present time, quite frequently dealers, in competing against each other, each one is a substantial buyer of Barre granite, advertises it and sells it, other dealers will likewise be forced to do it and we believe that by getting more outlets through carrier service, especially on less than carload shipments because there is more and more a tendency or shift to Barre granite.

Q. Will the institution of this service make it possible for you to acquire new customers, new markets for your product that you cannot reach now?

A. Yes, we believe so.

Q. As far as your using the rail service and liking it, are you also connected officially with one of the railroads in Vermont?

A. I am.

Q. Which railroad is that?

A. The Barre and Chelsea Railroad.

Q. What is your connection with that railroad?

A. Director and Treasurer.

Q. I gather from what you have said and also your con- [fol. 310] nection, you are a firm believer in railroads and want good strong railroads.

A. We do, and in fact we are part owners of the railroad in question.

Exam. Roberts: With what frequency would you use applicant's service if it were authorized from Barre, Vermont?

The Witness: I think that we would have almost daily need of it. In other words, I have some one thousand active dealers and every day work is being finished out through this territory.

Exam. Roberts: What would be the volume of that traffic that would move out daily?

The Witness: I haven't broken down the value that we have shipped less than carload versus carloads.

Exam. Roberts: Would it amount to more than one truckload a day?

The Witness: It would not.

Exam. Roberts: It would not?

The Witness: No, not from our firm alone.

Exam. Roberts: What would you consider an average truckload, in weight?

The Witness: From our firm?

Exam. Roberts: Yes, of your product.

The Witness: I understand the trucks can haul up to fifty thousand pounds. I am not sure I understand your [fol. 311] question.

Exam. Roberts: Have you ever used motor carrier service in the past?

The Witness: Yes.

Exam. Roberts: What do you consider an average truckload, what weight?

The Witness: An average truckload, ten to twenty tons.

Exam. Roberts: That is approximately forty thousand pounds as an average, is that correct?

The Witness: Yes.

Exam. Roberts: Would you have forty thousand pounds a day moving outbound from Barre, Vermont to this sixteen state destination territory?

The Witness: That would be eight million pounds a year, and our total shipments out there were only 1,600,000 pounds.

Exam. Roberts: So you would have approximately, based on that as an average, only about five thousand pounds, would you not, or one eighth of that amount?

The Witness: Yes. There are seventy-three manufacturers in Barre, Vermont.

Exam. Roberts: We are interested only in your output as to what need you would have for this man's service out of Barre, Vermont. Would you have as high as five thousand pounds a day moving out of there?

The Witness: On an average, no, I would say perhaps two [fol. 312] hundred pounds. In other words, of this 1,600,000, I rather gather that say 600,000 pounds were less than carload shipments and dividing 600,000 pounds by two hundred days, that would be about 3,000 pounds on an average a day.

Exam. Roberts: A day?

The Witness: Yes.

Exam. Roberts: Would you consolidate those shipments weekly or would you expect them to transport that outbound each day?

The Witness: From our point of view we would like to have them out each day, and the dealer would like them each day.

By Mr. Morken:

Q. You have no objection to the carrier consolidating your shipments on his truck with shipments from other manufacturers?

A. Not at all.

Q. Just as long as they are moved at the first possible moment?

A. That is right.

Q. Are you getting daily outbound movement by truck to other areas? I mean not the Midwest.

A. Pennsylvania and New York.

Q. Motor carriers are giving you that service now?

A. Yes.

Q. Daily service?

A. Yes.

[fol. 313] Q. Prior to coming here, did you meet with other shippers of the Barre Granite Association and discuss this proposal?

A. I did.

Q. Was Mr. McBride at that meeting?

A. He was.

Q. Did you, as well as certain other shippers, authorize him to appear and testify in this proceeding?

A. We did.

Q. And he is present in the room?

A. Yes.

Mr. Morken: That is all.

Exam. Roberts: We will take a short recess.

(Short recess.)

Exam. Roberts: Come to order, please, gentlemen. Proceed with your cross-examination, Mr. Lane.

Cross-examination.

By Mr. Lane:

Q. On your Exhibit No. 22 you have a number of dealers listed for the State of Wisconsin. Are any of those dealers in Wisconsin strictly carload receivers?

A. On occasion. Any one or two or three might be a carload buyer.

Exam. Roberts: From what point would that move?

The Witness: Well, like Zimmerman, we might have a carload for them.

Exam. Roberts: That is located in Milwaukee, Wisconsin.

[fol. 314] The Witness: Yes.

By Mr. Lane:

Q. Do you mean you have participating pool car shipments to Wisconsin points?

A. Yes.

Q. On all of the states listed on Exhibit No. 22, they all receive pool car shipments as well as carload, do they not, with the exception of the State of Wyoming?

A. There may be some exceptions, but in most instances, yes.

Q. The pool car arrangement involves the aggregation of a number of less than carload shipments and then the carload moves on one bill of lading to one consignee, is that right?

A. That is correct.

Q. Who makes the pool car shipment for him?

A. There are instances where my own company might join with other companies whom we knew had granite going into that area, and we would consolidate. We would consign it to one of the dealers, first getting his approval. That isn't very satisfactory because that dealer is held responsible for the freight, not only of his own, but of his friendly competitors. Sometimes there is a question of accuracy of weight involved because we don't weigh work but have to estimate it, so that that type of consolidation had its drawbacks.

Q. Is there an association that assists you in the consolidation of these pool car shipments?

A. Yes.

[fol. 315] Q. What is the name of that association?

A. Barre Gill Consolidated Service.

Q. That is an organization made up of the various manufacturers in the Barre, Vermont area, is it not, a non-profit organization?

A. That is right.

Q. When you aggregate shipments or hold them, such as is portrayed on Exhibit No. 23, that is for the purpose of securing the carload rate, is it not, sir?

A. Yes, mainly.

Q. Being familiar with the Barre and Chelsea Railroad as an officer and a director, Barre and Chelsea Railroad furnishes a daily service, does it not?

A. A daily service?

Q. Yes, the Jones Brothers may ship less than carload every day, every working day, via the Barre and Chelsea Railroad?

A. Yes.

Q. Were you present at Milwaukee, Wisconsin at the previous hearing?

A. No.

Q. Have you read the transcript of the record?

A. Part of it.

Q. Do you know that the applicant proposes to depend upon eastbound movements in conjunction with the movement out of Vermont and, in some cases, deadhead from [fol. 316] points like Ohio, New York and Pennsylvania up to Barre, Vermont to pick up granite?

A. That is my understanding.

Q. Has the applicant promised your company that he would provide a daily service or a weekly service or a semi-monthly service?

A. That is my understanding that he would provide that service if granted the authority.

Exam. Roberts: Which of those that counsel mentioned?

The Witness: Daily to two or three days.

Exam. Roberts: Did he indicate to you that he would permanently station equipment at Barre, Vermont for your use?

The Witness: That is my understanding, that he would try to have available trucks in Barre.

By Mr. Lane:

Q. That wouldn't be very practical with the number of units that he operates, and the scope of the application,

to have three trucks stationed there, or one truck stationed there when he contemplates sixteen states westbound from the Vermont area and he has an enormous area in the reverse direction.

A. It is my understanding in talking with him that he plans to get a truckload a day out of the Barre, Vermont area.

Q. If he is granted the authority by the Interstate Commerce Commission, what did he promise to you with respect to shipment such as those shown on Exhibits No. 22, page 2, [fol. 317] going to Greeley, Colorado? Would you receive that shipment every week throughout the year, or did he intend to let that traffic accumulate at Barre until he accumulated a truckload?

A. I can't answer that.

Q. Do you know what the weight of those shipments was that were destined to Greeley, Colorado, the second item on page 2 of Exhibit No. 23, which is marked 1662-66070?

A. No I do not.

Q. If I asked the same question with respect to all of the other shipments with regard to weight, you do know the weights?

A. I do not know the weights.

Q. As a fair-minded man, you wouldn't expect Mr. Schaffer to take a one thousand pound shipment out to Greeley, Colorado with a single truck, a single shipment in one truck?

A. It is my understanding that he would have sufficient weight going out into that area so that he would get that shipment down to Greeley, Colorado.

Q. With regard to the shipment on the same page consigned to Rodriguez Brothers at San Antonio, Texas, did he indicate that he was going to run a truck every week down to the Texas area to take care of the Texas shipment?

A. That is my understanding.

Q. And the same question with respect to all other states, such as Arkansas and Montana?

A. That is my understanding.

[fol. 318] Q. In response to a question by the Examiner, I believe you stated one million approximately last year went via rail carload service and pool car service and about 600,000 pounds less than carload.

A. That is an approximation. I do not have the weights broken down between pool car and less than carload.

Q. On that 600,000 pounds of less than carload, some portion of it was transported by common carrier by motor, wasn't it?

A. No, the 1,600,000 pounds approximately were shipped into the territory involved in this discussion.

Q. Confined to this territory alone?

A. That is correct.

Q. These sixteen states?

A. Yes.

Exam. Roberts: Is that an average tonnage to that territory each year?

The Witness: I would say so.

By Mr. Lane:

Q. Your plant, as well as the other plants in the Barre, Vermont area, have been on strike for a number of weeks, has it not?

A. Yes.

Q. Twenty-two weeks, to be exact.

A. Five months and one week.

Q. The strike is just over now?

A. Yes.

[fol. 319] Q. Isn't it true that your company, as well as the granite manufacturers, are working on orders for Memorial Day of 1953?

A. That is correct.

Q. All of the shipments made by Jones Brothers are F.O.B., made on the basis of FOB, Barre, Vermont?

A. They are.

Q. Does your company have a traffic manager?

A. It is a pretty high sounding title. We have a shipping clerk who devotes his entire time to shipping.

Q. The shipping clerk will take instructions from any of your customers as to routing of traffic, will he not?

A. Yes.

Q. And he will honor that routing?

A. If possible, yes.

Q. The direct examination indicated you did use several carriers by motor vehicle from the Barre, Vermont area to New York and Pennsylvania.

A. New York and parts of Pennsylvania.

Q. Who are those carriers?

A. One is St. Johnsbury, and one is Churchill.

Q. Ray Churchill?

A. Yes, and one goes to Florida.

Q. And the first one is located in Barre, Vermont?

A. Yes.

Q. Have you used Gay's Express?

[fol. 320] A. I think on occasion we have.

Q. Have you used H. P. Welch Company from Barre to New York City?

A. I believe we have.

Q. On any occasion has your company tendered any granite shipments to any of those motor carriers for furtherance beyond the line, that is interline shipment, interchanging the shipment at Philadelphia or New York or any other point for ultimate delivery in any one of these sixteen destination states?

A. Not to my knowledge, is it possible. Answering you directly, no.

Q. They have never refused to handle the shipment?

A. Do I understand your question. Has my company ever shipped by common carrier, a motor carrier, from the City of Buffalo, New York west into some of the sixteen states?

Q. That is true, from Barre, Vermont via interline service, say via Barre, via St. Johnsbury Company or H. P. Welch Company of New York City or Albany, or any other point like that, for interchange with some western carriers.

A. No, not to my knowledge.

Q. Do you know whether or not there is such a service available?

A. I understand there is not such a service available.

Q. Did your company support an application of another carrier last June, wherein the St. Johnsbury Trucking Company and W. L. Mead Company provided a service [fol. 321] via Boston and Springfield, Massachusetts to points in the State of Ohio?

A. Not to my knowledge.

Q. Has your company ever sent a witness to Columbus, Ohio?

A. Not to my knowledge.

Q. Do you know whether or not St. Johnsbury Trucking Company has interchange arrangements with W. L. Mead Company?

A. I do not know that they have.

Exam. Roberts: How many plants do you have in the Barre, Vermont area, that Jones Brothers Company operates?

The Witness: The Jones Brothers Company has just one plant and we also own a quarry.

Exam. Roberts: Would any of these movements originate at the quarry?

The Witness: Yes, there would be some originating traffic at the quarry.

Exam. Roberts: Where is that located in relation to Barre, Vermont?

The Witness: It is just three miles away. It is in Granitsville, but is considered in the so-called Barre district or area.

Exam. Roberts: All of your operations would originate within an area of five miles of Barre, Vermont, is that right?

The Witness: That is right.

By Mr. Lane:

Q. Your company has been in business for many years, has it not?

[fol. 322] A. Seventy-two years.

Q. During all that period your company has grown, has it not, expanded its operations and become successful?

A. I would say so.

Q. And during all that time you used rail service?

A. That is correct.

Q. The Barre Chelsea Railroad derives better than fifty percent of its revenue from granite, does it not?

A. I understand so.

Q. It would be a serious blow to the Barre and Chelsea Railroad if it lost much of the present granite traffic?

A. It will be a serious blow to the Barre and Chelsea Railroad if we can't get more granite business into Barre.

Exam. Roberts: Into or out of it?

The Witness: Orders in and shipments out.

By Mr. Lane:

Q. Ordinarily, don't the dealers place their orders with Jones Brothers several months in advance of delivery?

A. That is not necessarily true, no. Many of our orders are placed daily and shipment requested as soon as possible.

Q. Will you turn to Exhibit No. 23, Mr. England?

A. Yes.

Q. On that first shipment which was finished on March 22, 1951 and was not shipped until May 11, 1951, that could have gone out on the 22nd of March, could it not, via rail less than carload?

[fol. 323] A. Yes.

Q. The reason it was held was to take advantage of the pool car rate.

A. Yes.

Q. And the same applies to every other shipment?

A. I believe so.

Q. So that where the two factors have to be weighed, transit time and the rate, isn't it true that the rate governs?

A. No, not necessarily. I think a dealer, if he possibly can, will instruct us to hold the shipment until it can get into a pool car because of the rate.

Q. Yes sir. That is customary, is it not?

A. Yes.

Q. Isn't it true, Mr. England, that so many of the dealers throughout the United States, the only shipping instructions that they give to your shipping department is, "Ship via cheapest route"?

A. They usually say, "Ship best route."

Exam. Roberts: Do the dealers pay the freight on these shipments?

The Witness: Yes.

By Mr. Lane:

Q. That is true of every shipment, the consignee pays the freight?

A. There are instances where a consolidated car in-
[fol. 324] volving several dealers, that we prepay the freight because of the objection of one of the consignee dealers to putting up the entire freight bill, but that is the exception to the rule.

Q. Ninety-nine and forty-four hundredths percent of the time, the shipments are sold FOB Barre, Vermont?

A. Yes.

Mr. Lane: That is all.

By Mr. Metzler:

Q. With reference to the one million pounds that go by rail, could you break that down into what is strictly carload and what is pool car shipment?

A. I am sorry I can't.

Q. I was wondering whether you could give me an approximation of the one million pounds that move annually. Was it one percent, ten percent, or fifty percent, just to get a general idea as to how you broke down the 1,600,000 figure into say 600,000 for less than carload.

A. I would say that perhaps forty percent might go carload, either straight carload or consolidated carload versus pool cars.

Q. So that 600,000 pounds is pool car, 400,000 is carload, and another 600,000 is less than carload. That is for your 1,600,000 pound figure.

Exam. Roberts: That is the one million pounds, is it not?

The Witness: Yes. That 600,000 was my estimate of straight less than carload. That forty percent of the one
[fol. 325] million straight carload——

By Mr. Metzler:

Q. Is 400,000 and 600,000 by pool car shipments?

A. Yes, and I qualify that by stating that it is an approximation.

Q. In reference to those shipments on Exhibit No. 23, you said you did not know the exact weight on each one, but are there thirty shipments there, and I was wondering about the approximate weight on each one.

A. I could not answer.

Q. Just like your preceding figure, could you give a rough guess? Would it be about one thousand pounds in each one?

A. One thousand pounds?

Q. I think you said Lee M. Bogle Company of Minneapolis, Minnesota, had two shipments. Would that be about one thousand pounds each?

A. I would sooner say it would be two thousand pounds.

Q. Just take the two thousand pounds as an approximate figure, then times thirty, which are the thirty instances listed there, that would be about sixty thousand pounds.

Exam. Roberts: Is that a question?

By Mr. Metzler:

Q. Then the balance of it or nine-tenths of them would be shipped reasonable promptly, would they not, if these are more or less the isolated instances that you picked out? [fol. 326] A. I did not ask for a thorough study. I asked for some isolated cases.

Q. I want to establish that point as to whether or not isolated cases—in reference to the testimony about damage you said there were instances of damage to goods. Do you recall whether any times when you filed a claim with a railroad, freight claim agent and you were not reimbursed in full for the loss or damage?

A. No. To the best of my knowledge we have always been fairly reimbursed.

Q. Often when fruits or produce is shipped, the needs are difficult to anticipate because in perishable commodities it is rather difficult to see what the needs are; but for your commodities, isn't that a fact that the needs of the dealer are relatively fixed or constant? Say in reference to monuments, they know approximately how many people are dying and it is not a variable or fluctuating figure, is that not true?

A. No, that is not true. To the contrary, dealers enter into high competition. Many people want their own custom made individual memorials, so that a good part of the volume is custom made work.

Q. But still the needs with the instances of the custom made requests are more of a fixed quantity than in a great many other instances.

Mr. Morken: The question is vague and indefinite.

[fol. 327] Exam. Roberts: I think it is more an argument than a question. Can you rephrase your question a little bit? I am not sure that the witness understands what you are driving at.

By Mr. Metzler:

Q. In brief, are the needs of the dealers reasonably fixed from season to season?

A. I don't believe so. A dealer's business may average somewhat but we find, oddly enough, in memorials that we have full time designers constantly making up new and different styling of memorials.

If you were to go in and buy one, chances are you would want your individual, some individual idea carried out.

Q. Getting back to the monuments, what percentage of the monuments are individualized and what percent are the regular stone?

A. I would say that seventy percent of the memorials that we build our customers wanted them custom made.

Exam. Roberts: They are what is known as the finished product?

The Witness: Yes.

Exam. Roberts: And the rough stone you would obtain from the quarry would go to the dealer for finishing?

The Witness: The dealer would finish it, that is correct.

Exam. Roberts: How much of that do you ship in rough compared to the finished product, percentage-wise?

[fol. 328] The Witness: Ten percent, maybe three or four carloads in this territory involved.

Exam. Roberts: Per year?

The Witness: Yes sir.

Exam. Roberts: That is the rough?

The Witness: Yes sir.

By Mr. Metzler:

Q. But there is still not an immediate need, like in a manufacturing business when a person is already dead, one more day or week doesn't make too much difference?

Exam. Roberts: I think we went into this at the prior hearing.

Mr. Morken: Three times.

Exam. Roberts: Let us not have more of that.

By Mr. Metzler:

Q. In reference to this interchange which Mr. Lane was talking about and the trucking service down to New York, what about the tie-up with this Granite City Transfer Company that entered an appearance at the June 13, 1952 hearing? Don't they also offer trucking service from the Midwest to the East?

A. To Vermont?

Q. No, down to New York.

A. I don't know. They don't to Vermont.

Q. I mean interchange could be made with the existing carriers down to New York and that one to the West.

Exam. Roberts: Are you asking or testifying?

[fol. 329] Mr. Metzler: I am asking.

By Mr. Metzler:

Q. Could it not be made?

A. Not to my knowledge.

Q. You said in your direct examination that one of the advantages of the applicant's services are that, and I quote, "You get lower rates from the trucking service". Could you elaborate on that?

A. Did I say that?

Q. I believe you did.

A. Will you rephrase your question, please?

Q. I was wondering what you meant by the statement that lower rates from the trucking service were available from the other centers.

A. I intended to say that we have found that dealers will buy from other centers, that they will truck granite to

them either from Minnesota or from Elberton versus the high less than carload rate and length of service from Barre, Vermont.

Q. What do you mean by the high rate?

A. The high less than carload rate.

Q. So then the applicant would be given a lower rate, is that it, in contrast to the existing rail rate?

A. I don't happen to know what the applicant's rates will be, but I do understand that truck rates from Elberton and from Minnesota happen to be lower than less than carload rates from Elberton and from Minnesota.

[fol. 330] Q. By an chance did you read the December Readers Digest, December 1952 Readers Digest?

A. I think I read part of it.

Q. Did you see this article on page 41 entitled "Huge Trucks Do More Than the Share of Damage, Pay Less Than Their Share of the Cost"?

Mr. Morken: We are referring to something that is not in evidence and which is silly, and I think counsel should be reprimanded for even trying to go off on a tangent that way.

Exam. Roberts: I sustain the objection.

Mr. Metzler: I would like to reply to counsel's objection. This involves long distance heavy trucking.

Exam. Roberts: I made my ruling. If you wish to rephrase your question you may, but I don't think this is relevant to the situation here.

Mr. Metzler: That is all.

Redirect examination.

By Mr. Morken:

Q. You testified, as I recall on cross-examination, that you did not know what rate the applicant would charge and I wanted to ask you this; are you here on the basis of the rates? In other words, is your support to more or less cut rates? Is that what you want in this proceeding?

Mr. Lane: I object. The testimony is very clear. I think Mr. England is a very competent witness and he stated

very clearly and definitely the purpose of his support of this application.

[fol. 331] Mr. Morken: Are you satisfied that he is not here for rates?

Exam. Roberts: I think it is clear as to what his comparable rates are, based on the rates out of Elberton and points in Minnesota, is that not so?

The witness: That is correct, but I have appeared before the railroads trying to point out inequalities of rates and trying to get them to change and modify them. I am not down here on rates as such.

Exam. Roberts: I think that answers your question, Mr. Morken.

By Mr. Morken:

Q. You mentioned also on cross-examination that you had read the transcript, at least in part. Did you read the testimony of any of the monument dealers in the Midwest area who testified at the prior hearing in St. Paul?

A. I read the testimony of Mr. Joe Osborne of Osborne, Peterson, Incorporated, and Harry McCarty, of Hutchinson, Kansas.

Q. Do you supply those men?

A. Yes.

Q. And have you done so for quite a few years?

A. Yes.

Q. As far as the testimony relative to their operations and their needs and their service, are you able to classify [fol. 332] them as one of your customers? Are they a special, typical and average or unusual?

Mr. Lane: I object to the question. I don't know what he is talking about.

Mr. Morken: I will rephrase it.

By Mr. Morken:

Q. Can you tell us whether Mr. Osborne and Mr. McCarty from Hutchinson, Kansas are average or typical dealers?

A. I would say that they are very typical. Osborne does some manufacturing which throws him into a retail

and manufacturing dealer. McCarty does very little manufacturing and as I read the testimony of those two dealers I feel it is very typical of the problem facing dealers out in those sixteen states.

Q. The list of dealers then on Exhibit No. 22, as far as your company is concerned, is generally similar to Mr. McCarty and Mr. Osborne?

A. Yes.

Q. And one more question: Do these customers look to the Jones Brothers to get them a transportation service to deliver their granite?

A. They have been somewhat critical of us for not trying to help out along those lines.

Q. Even though they pay the freight, they look to you to get the goods to them?

A. That is right.

[fol. 333] Mr. Morken: That is all.

Recross examination.

By Mr. Lane:

Q. Isn't it true that the granite from Elberton, Georgia is an inferior grade, far inferior to that manufactured in the Barre, Vermont area?

A. We believe it so, yes.

Q. Isn't the same thing true of the Minnesota granite?

A. We believe so.

Mr. Lane: That is all. Thank you very much.

Exam. Roberts: You may be excused.

(Witness excused.)

Mr. Morken: I will offer Applicant's Exhibit 22 and 23 in evidence.

Mr. Lane: No objection.

Exam. Roberts: Hearing no objection, they will be received in evidence.

(Applicant's Exhibits No. 22 and 23, Witness England, were received in evidence.)

Exam. Roberts: Call your next witness, Mr. Morken.

Mr. Morken: Mr. Examiner, Mr. Wright, the next witness, has a prepared statement. I can ask him a few foundation questions. His prepared statement is brief and to the point. I have read it. It will simplify matters and speed it up if he is permitted to read the statement.

I can also tell you ahead of time that it is generally [fol. 334] similar to the testimony of other witnesses. We do not have copies of it to pass around.

Mr. Lane: May we examine the one copy?

Exam. Roberts: I think the opposing counsel should be permitted to look at it to determine whether there is any argumentative matter to cross-examine on. We will go off the record for that purpose.

(Discussion off the record.)

Nelson P. Wright was sworn and testified as follows:

Direct examination.

By Mr. Morken:

Q. Will you state your name, please?
A. Nelson P. Wright.
Q. Where do you live?
A. Barre, Vermont.
Q. By whom are you employed?
A. By Rock of Ages Corporation.
Q. What is your position?
A. Sales manager.

Q. Do your duties as sales manager involve the supervision or direction of the shipments of the Rock of Ages people from Vermont to the sixteen Midwest states involved in this application?

A. No, not as such. We have a traffic clerk who handles that but it falls on my department and shoulders to pacify [fol. 335] some of these dealers in part when they loudly complain about late delivery, particularly on less than carload shipments.

Q. As far as the service that you now have for your

company on monuments of granite from the Vermont area to the Midwest, are you familiar with the transportation problem of the Rock of Ages Corporation?

A. Definitely.

Q. Will you describe to us briefly if you care to, tell us what the Rock of Ages Company is, what they do and their size, if you can?

A. Our company is a quarrier of granite and also a manufacturer of finished monuments and markers that our distributors, throughout all of the states of the Union, handle. We do not ship any rough stone or raw material from our quarry outside of the Barre, Vermont district, but we do ship a large volume of finished memorials into forty-six of the forty-eight states.

Q. You are familiar generally with the proposal here of the applicant and what he wants to institute in so far as the trucking service and the area he wants to serve?

A. Yes I am.

Q. In preparing to come here, did you summarize your testimony in a written statement that you desire to read into the record at this time?

A. I did.

Q. Will you go ahead and read your statement?

[fol. 336] A. We are endeavoring to build up our distribution to dealers in every state, particularly in the sixteen states on the attached list as they have a high agricultural population. We find that the farmer prospect with practically a guaranteed income is our best market.

We are handicapped considerably in obtaining new dealers in these states because of these difficulties.

Currently we have one hundred sixty-eight in these sixteen states. Forty-five buy in carload quantities. This presents no problem. One hundred twenty-three, or seventy-three percent, do buy in less than carload quantities. Less than carload shipments are not satisfactory for the following reasons:

Delay from time merchandise is shipped until delivered to destination.

Damage while in transit. Oftentimes the crating is practically destroyed by rough handling. We pay particular attention to crating to prevent damage and have the repu-

tation of having one of the best crating facilities in the industry.

When possible, pool car shipments are made but these are not satisfactory for the following reasons:

It is difficult for one dealer to whom the merchandise would be consigned to pay the freight on the entire car as he often experiences difficulty in obtaining his money promptly from the other participating dealers. It is diffi- [fol. 337] cult for him to perform the task of unloading and reforwarding to other dealers.

During peak seasons such as Memorial Day, All Souls Day and Armistice Day, neither less than carload or pool car shipments are satisfactory as it requires two weeks and sometimes longer for this type of shipment to reach the dealer. Delays in transit and damages while in transit, particularly on less than carload shipments, work against the dealer's making erection on time in the cemetery. On pool cars the dealer often does not have railroad siding facilities available and considerable rehandling is required.

Competitive areas such as the South, principally in Georgia, and our Western competitors in Milbank, South Dakota, and the St. Cloud, Minnesota area, have motor carrier services which greatly facilitates delivery on orders less than carload. Currently there are no authorized motor distributors available to Barre manufacturers and the dealers in the sixteen states. Schaffer Transportation Company could bring Western granite in less than carload quantities to the East and the Barre district could use those facilities for shipments going West into the sixteen states mentioned.

It is not our thought to eliminate railroads; in the long haul an authorized motor carrier for quantities less than carload would be beneficial to the railroad as we could build the dealer into a carload buyer. A motor carrier would not [fol. 338] eliminate pool cars to any extent but two or more truckloads going West into these sixteen states out of the Barre district would place us in a competitive position because of quicker and better service as it would mean door to door delivery for our dealers.

I should like to qualify that statement in the last sentence where I said "two or more truckloads going West".

I have not put in the time. I would say that would be per week.

Q. Have you finished the statement?

A. Yes.

Q. If the service is authorized, you contemplate the Rock of Ages people will have approximately two truckloads a week available?

A. Two or more truckloads on less than carload shipments.

Q. What would be the total poundage per shipment or per truckload?

A. Some where between twenty-four thousand and thirty thousand pounds.

Q. You have heard the previous witness testify, have you not?

A. Yes.

Q. Is the operation of the Rock of Ages Company, manufacturing and distributing and so on generally similar to that of the Jones Brothers Company?

A. Yes, approximately.

Q. Your experience in matters of transportation from [fol. 339] the Barre, Vermont area to the West, have they been the same as those of the Jones Brothers?

A. Yes.

Q. Are you making truck shipments at the present time to other points not involved in this application?

A. Truck shipments to places other than the sixteen state area, yes. Apparently we are making truck shipments to other places through authorized motor carriers into New England, New Jersey, Pennsylvania, somewhere around Philadelphia. To my knowledge, there is no trucking service beyond that, and then a line directly west of Philadelphia into Pittsburgh and north to Buffalo. Beyond that, to my knowledge, there is no authorized motor carrier from the State of Ohio on.

Q. When you crate your product to ship by truck at the present time, is it a different crating job than you do when it will be shipped by rail?

A. No, we crate them the same.

Q. You crate them the same way?

A. Yes.

Exam. Roberts: How do these shipments move by truck? Are they moved on an ordinary van type trailer or a lo low boy trailer?

The Witness: As I understand it, they are moved on what I call a platform trailer type.

Exam. Roberts: Flat bed equipment?

[fol. 340] The Witness: Yes.

Exam. Roberts: They are not particularly of the low boy size that are set low on the ground, as the compared to the height of the ordinary van?

The Witness: That is right, the covered van or truck covers it just as an impediment when they try to unload it.

Exam. Roberts: Do you use a tarpaulin to cover the granite en route, do you know?

The Witness: Yes, I notice most of the carriers carry that, one that can be whipped on and off by hand.

Exam. Roberts: They don't require particular loading or unloading facilities, do they?

The Witness: We attempted to ship a piece of granite down to the State of Alabama by a carrier who had not ever carried granite. In fact we sought out several of them and they turned us down. The loading and unloading of granite and the packing of it takes an experienced man, so that the load doesn't shift and it arrives in safe condition.

Exam. Roberts: The carrier doesn't have that responsibility, does it, of loading and unloading?

The Witness: Yes, to a degree the driver of the truck will tell them how to do it, also help in loading and unloading the truck.

Exam. Roberts: The truck itself doesn't require winches, or to be equipped with winches?

[fol. 341] The Witness: Not in every case. There are a few that way, but very few.

Exam. Roberts: Do you use cranes for the loading of your vehicles?

The Witness: Yes.

Exam. Roberts: They are your own at the plant?

The Witness: Yes.

Exam. Roberts: How many of these plants do you have and where are they located with respect to Barre, Vermont?

The Witness: We have five plants. But two really are used for shipments to dealers thought and the one plant is in Montpelier, Vermont and the main plant is in Northfield, Vermont, which is about twenty-two miles from Barre, Vermont, and Montpelier is about seven miles away, and the other three plants are for the purpose of polishing, sawing, and processing the granite delivered to the large two finishing plants.

Exam. Roberts: You would never originate a shipment at those places for interstate shipment?

The Witness: No, just at Northfield and the one at Montpelier.

By Mr. Morken:

Q. You stated that the Rock of Ages people do not ship rough granite into these sixteen states. Do you recall that statement.

A. Yes.

Q. Are the E. L. Smith Company or the Whittemore and [fol. 342] Morris Company connected with the Rock of Ages?

A. They are a division of ours.

Q. Do they ship granite to the midwestern area?

A. Yes, and slabs.

Q. Would those companies use the proposed service?

A. No. On loads like that, all of those would be of such dimensions and size that they would go carload.

Mr. Morken: May we have this exhibit marked for identification?

Exam. Roberts: It will be marked Exhibit No. 24.

(Applicant's Exhibit No. 24, Witness Wright, was marked for identification.)

By Mr. Morken:

Q. Will you refer to what has been marked as Exhibit No. 24, and it consists, I believe, of eleven or twelve pages. Will you identify it, please?

A. This first page is the number of dealers we have in each one of the sixteen states and it lists them as the move-

ment by carload quantity and the number who buy less than carload or pool car delivery. And the weight we have here is the three year yearly average of the years 1949, 1950, and 1951. These are taken from our official records kept in our home office.

Q. This was prepared at your direction?

A. Yes.

Q. Again, it would mean that your company ships a little [fol. 343] over five million pounds a year from the Barre, Vermont area into these sixteen midwestern states?

A. Yes, and that is our finished goods only. The shipments of rough stock or slabs going from the other quarrying divisions would not enter into that.

Q. The balance of the exhibit is the names of the different dealers in the different states involved as they are summarized on the first page.

A. That is right, listed as carload and less than carload dealers.

Mr. Morken: I will offer Exhibit No. 24 in evidence.

Mr. Lane: No objection.

Exam. Roberts: It will be received in evidence.

(Applicant's Exhibit No. 24, Witness Wright, received in evidence.)

By Mr. Morken:

Q. Are you familiar, at least generally, with the testimony of the various monument dealers in the midwestern area who testified in this hearing in St. Paul?

A. Yes, I have read that report, particularly about the dealers Joe Osborne of Osborne, Peterson, Norris E. Walther of Fremont, Nebraska, Ed Hunstad of Aberdeen, South Dakota, and Paul Stevenson, of Moberly, Missour.

Q. Does your company sell its products to those people at the present time?

A. We sell all of them except Mr. Stevenson of Moberly, Missouri.

[fol. 344] Q. And those men who testified in this record, are they typical of the dealers whom you listed in Exhibit No. 24 as your customers?

A. Yes, Osborne is probably an outstanding dealer and the other two would be one medium and the other fair. So if you average the three of them you have a good cross section of all of the dealers we have listed here in the sixteen area and their remarks, I don't happen to have them with me, but if we would have letters from all the dealers, and boil them down, we would have the same thought and feeling as expressed by the three dealers.

Mr. Lane: I move to strike the witness's answer.

Exam. Roberts: Overrule the objection. Let it stand.

By Mr. Morken:

Q. Do these dealers look to the Rock of Ages people to get the transportation for the granite they buy?

A. Yes.

Q. Has the Rock of Ages Company had this matter of truck transportation from the Vermont area to the Midwest under consideration prior to this application?

A. Yes, we have had a number of meetings discussing various ways we could overcome our problem, getting connections and better service to our dealers, particularly in that area. Nothing has been definitely arrived at. We are hopeful that Schaffer Trucking will obtain authorization to do what he has applied for.

[fol. 345] Q. If this application is denied, will the Rock of Ages people still be interested in motor transportation?

A. We definitely would if we are to hold our market, what we already have, and to develop it, not to get all the business but what we would say our normal share of the business is.

Q. Would the institution of this service mean any increased business for you?

A. Yes, definitely I think it would.

Q. Why is that?

A. We would be able to get the merchandise to the dealer quicker and he would not have to order in quantities that would tie up too much capital. We have got a number of small dealers out there who can be built into larger dealers, but there are a number of them who currently, because of the price of the merchandise, just cannot carry a representa-

tive group of monuments that give a customer the choice of size and design, and therefore they need more frequent service out of Barre, Vermont.

Q. I notice you only have one dealer in the State of North Dakota. Do you have salesmen who work the State of North Dakota?

A. Yes, he is located in Seattle, Washington.

Q. Is there more than one monument dealer in North Dakota?

A. Yes, my guess would be about twelve dealers.

Q. It is a rather sparsely settled state, is it not?

[fol. 346] A. Yes.

Q. If your salesman contacts one of these other dealers that you don't sell to at the present time, is there any average size that these orders would get when you are trying to get some fellow to start out handling your line of merchandise?

A. Average size of the order or average size of the monument?

Q. Does he jump right in and buy a big mausoleum?

A. No he starts out with probably half a dozen monuments and a dozen markers.

Q. What would be the size of that order?

A. Oh, it would average around $2,000.

Q. In pounds, how big a shipment would it be?

A. Probably six thousand or eight thousand pounds.

Q. Would the availability of this proposed service in getting that man set up with this first order assist you?

A. Yes it would. As it is now, he would have to wait a considerable length of time in order to get a pool car, enough weight for a pool car to go out to that particular area, if we are talking about North Dakota.

I think where we have the biggest chance for expansion is obviously not in a sparsely settled state like North Dakota, but down in Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, Minnesota, those areas.

Q. You have the impression this transportation will permit an expansion of your business?

[fol. 347] A. It definitely would.

Mr. Morken: You may inquire.

Exam. Roberts: Cross-examination, Mr. Lane.

Cross-examination.

By Mr. Lane:

Q. Mr. Wright, how often has your company shipped pool car shipments on an average from Barre, Vermont?

A. I have got nothing here with me, so I will have to give an educated guess on that. It would average from a week to thirty days.

Q. And you hold those shipments for pool car movement to get the advantage of the pool car rate?

A. Yes.

Q. You are able to ship from Barre, Verment via the Barre and Chelsea Railroad and via the Central of Vermont Railroad, is that correct?

A. Yes.

Q. And both companies provide a daily service, do they not?

A. Well, frequently we have to—if you pin me down to say how many days do we have to wait for a car, I don't know, except what I hear the traffic clerk tell me that it is tough getting cars, that may be two or three days or a week.

Q. I want just your actual knowledge. With respect to the motor carriers, your company is using at the present time, I understood you to say that you are shipping down as far as Philadelphia and as far west as Buffalo, New York, is that correct?

[fol. 348] A. Yes.

Q. What carriers are you using to Buffalo?

A. I believe it is Churchill.

Q. Ray Churchill?

A. Yes.

Q. Did you ever request Ray Churchill to interline your shipments at Buffalo with another motor carrier providing service to the sixteen states involved in this application?

A. I cannot give you a specific instance, but the pressure that has been on us, I will transfer that request to the traffic clerk and ask him is it possiblt to get motor carrier delivery beyond Buffalo and the answer that has always come back was no.

Q. You are familiar with the territory west of Buffalo, having traveled there?

A. Yes.

Q. And you know of your own knowledge that there are motor carriers transporting general commodities, including granite, west of Buffalo?

A. No I don't know, not granite.

Q. Granite may be transported in any conventional motor vehicle, may it not, even though it is a van truck or it makes it easier to have a semi-truck with a low side or a flat bed truck?

[fol. 349] A. I suppose in theory that is correct, but we have not been able to get anybody to handle it. It is too bulky and too heavy.

Q. Do you know of any motor carrier who has refused to transport your shipment west of Buffalo?

A. No, I can't say I do.

Q. When you are shipping a monument, it may be transported in box car, isn't that so?

A. Transported in a box car?

Q. Yes.

A. Yes.

Q. And larger shipments are transported in open top equipment, is that correct?

A. In cars?

Q. Yes.

A. Yes.

Q. And the shipments that you do transport by motor vehicle to such points as Philadelphia, Buffalo, points in between, when the truck backs up to a shipping platform your men load the truck, do they not?

A. Yes.

Q. And at the other end the monument dealer supervises the unloading, isn't that correct? He has the crane and the other facilities, the bars or whatever is necessary.

A. They may not have a crane but they have facilities, [fol. 350] and the driver helps them.

Q. If the granite is properly unloaded, there is no skill necessary for the driver except to drive his vehicle carefully, isn't that so?

A. For the loading, that would be true; for the unloading,

the driver would have to help the dealer. Many dealers don't have cranes. They would have to use blocks or skids rails. You have the monuments weighing one thousand pounds on up to one ton; two tons or five tons. That requires a man with some knowledge of how to handle that weight.

Q. Your knowledge is similar to that of Mr. England of Jones Brothers in that all the granite is sold FOB Barre, Vermont?

A. Yes.

Q. Regardless of whether you would pick out the carrier or the means of transportation, your shipping clerk will honor the routing instructions of any one of your customers, is that so?

A. Yes.

Q. In your prepared statement you had reference to competitive areas, such as the South, which is Georgia and also the St. Cloud area. You have testified that they have motor carrier service which greatly facilitates their orders. What motor carriers do they have? Let us start out with Elberton, Georgia carriers.

A The only one I know of there is a fellow by the name of [fol. 351] Ratliff. He leases the trucks, or the trucks are leased to him, I am not too clear on that.

Q. Do you know whether he operates out of Elberton?

A. As I understand in that area.

Q. Do you know what type of service he provides, whether it is once a week, once a month, or whether he operates under lease of his vehicles?

A. I don't know the details except what the dealers tell me.

Q. I am looking for your own knowledge on that question.

A. Then I really don't know.

Q. Would you answer me the same, that you don't know, if I asked you the same question with regard to Milbank, South Dakota and St. Cloud, Minnesota?

A. If you asked me do I know the specific name, I don't know. All I know is what the dealer tells me.

Q. Prior to your appearance at this hearing, did you discuss the proposed service with Mr. Schaffer?

A. Yes, we had letters back and forth.

Q. And you examined the copy of the transcript of the previous hearing at St. Paul?

A. No I did not examine it, only in part, about what the dealers had to say.

Q. Who furnished you with a copy of that transcript?

A. Yesterday I got a chance to glance through it. I certainly didn't read it.

[fol. 352] Q. If you hold shipments for pool car movement from a week to thirty days where you have the opportunity to ship daily via either the Central of Vermont Railroad or the Barre and Chelsea Railroad, is the decision to hold for the pool car movement brought about by the cheaper pool car rate and the saving to the dealer?

A. In part, if you ship it less than carload you have to pay the higher rate and the pool car is more economical and of course a solid car is more economical. But you don't have enough weight going to the dealers in a specific area. They don't want—I should say they don't order this week and it is shipped a month later. They order this week and want it shipped next week. It may take you a while to get those orders accumulated to get enough weight for a pool car.

Q. Maybe I can shorten this up. If this applicant, Mr. Schaffer, should receive the authority that he seeks, Mr. Wright, from the Commission, and he publishes a tariff on a parity or higher than the present less than carload rail rate, you can't give him any business, can you?

A. Frankly, a dealer can control that. Our dealers seem to be mostly concerned with getting quicker delivery.

Q. If they order quicker delivery, do you hold shipments for thirty days when you can ship every day in less than carload lots?

A. If you ship in less than carload delivery, it will cost a [fol. 353] lot more than it will in pool car.

Q. Did Mr. Schaffer give you any assurance as to what he would provide if this authority was granted, that is, frequency of service?

Mr. Morken: I don't like to interrupt but I will have to. I have been waiting for a specific question to make the specific objection that is assuming facts not in evidence. My compliments to Mr. Lane. He has done a beautiful job of staying away from it. I gather, from what Mr. Wright said,

that he isn't familiar with what is in the record, and I don't think Mr. Lane is. But I think it is in the record and the way Mr. Wright told about his present tariffs and split delivery, we are not basing anything here on less than carload rates, and the whole proposition is in the record. I think you have either confused yourself or confused the witness because of not having that knowledge of it.

Mr. Lane: I read the transcript from cover to cover and I am thoroughly familiar with what the applicant proposes to do. I am also familiar with numerous other applications where the authority was sought to transport granite. What I am trying to develop from this witness is whether or not he has knowledge of the service which would be rendered, or whether the existing service is superior to that offered by Schaffer.

Exam. Roberts: I think the question could be more direct as to whether the applicant proposes to charge a rate [fol. 354] higher or lower than the less than carload rate or comparable to the pool car rate. I think you can phrase that question a little more directly in that respect. I will overrule your objection.

Mr. Lane: Shall I rephrase the question?

Exam. Roberts: Yes, proceed.

By Mr. Lane:

Q. If Mr. Schaffer published a tariff with the higher rate level than the existing less than carload rail rate, you couldn't give him your business, could you?

A. I don't think so.

Q. Mr. Wright, were you present throughout the hearing today?

A. Yes.

Q. Did you hear all the testimony of Mr. Schaffer?

A. Yes.

Q. Did you hear him testify about the deadheading of his vehicles from destinations where he would bring the stone eastbound?

A. Yes.

Q. And then he would run empty up to the Barre, Vermont area?

A. Yes.

Q. And you are familiar with the eastbound territory that he is looking for?

A. Vermont and——

Q. I am sorry, Mr. Wright, I mean the other direction. This applicant is seeking authority from points in Grant County, South Dakota.

[fol. 355] A. From East to West?

Q. From West to East?

A. From West to East?

Q. Yes. Do you know that he was looking for a two way haul?

A. Yes, definitely.

Q. Do you know he was looking for authority, for example, from Grant County, South Dakota down to the State of Louisiana?

A. I don't know if I knew—yes, yes.

Q. As a practical man, Mr. Wright, do you think that this carrier would take one thousand pounds from the Jones Brothers destined to Oklahoma, one thousand pounds from your company to the State of Arkansas, one thousand pounds from another manufacturer to a point in West Texas, and another one thousand pounds to a point in Louisiana, and be able to survive in making all those deliveries?

A. No, it wouldn't be practical and your question, while good, I don't think there would be instances where we would have shipments in such scattered points.

Q. You have indicated you have customers in all these states, have you not?

A. Yes.

Q. You have twenty-two dealers in Texas?

A. Yes.

Q. In order for you to accumulate a sufficient volume for Mr. Schaffer to make a truckload, he might have to wait [fol. 356] quite a while, isn't that so?

A. I think if you will look at the weight that we have and the number of dealers, and there are twenty-one dealers in Texas who are less than carload dealers and eight dealers who are carload dealers, making a total of twenty-nine. If you eliminate the carload dealers, take the twenty-one dealers, and take out the carload weight, there are eight

carloads at forty thousand pounds each and you have considerable weight available every thirty or sixty days going in there.

Q. Shipments once every two months?

A. About every month.

Mr. Lane: That is all I have.

By Mr. Metzler:

Q. You were in the hearing room and you heard Mr. England's testimony. Would your answers be substantially similar to Mr. England's answers.

A. Yes.

Mr. Metzler: That is all.

Redirect examination.

By Mr. Morken:

Q. You have discussed this matter with Mr. Schaffer, his proposal?

A. Yes.

Q. In that direction, are you familiar in a general way with how he is now operating in hauling granite?

A. In a general way, yes.

Q. If he is able to establish a similar service for you from [fol. 357] Vermont, is that the type of service you seek?

A. That he is performing for our western competitors?

Q. Yes.

A. Definitely.

Q. What he proposes is nothing that is unusual or difficult. It is being done every day?

A. That is right.

Mr. Morken: That is all.

Exam. Roberts: You may be excused.

(Witness excused.)

Exam. Roberts: We will adjourn at this time and come back at 1:30 this afternoon.

(Whereupon, at 12:16 p. m., a recess was taken until 1:30 p. m. of the same day.)

[fol. 358] AFTERNOON SESSION

1:30 p. m.

Exam. Roberts: Come to order, gentlemen.

Call your next witness, Mr. Morken.

Mr. Morken: I call Mr. McBride.

Exam. Roberts: You were previously sworn at the prior hearing, were you not, sir?

Mr. McBride: Yes sir, I was.

RICHARD T. MCBRIDE having previously been sworn, testified further as follows:

Direct examination.

By Mr. Morken:

Q. You are the same Richard T. McBride who testified at a proceeding in St. Paul, Minnesota, last June, is that correct?

A. Yes.

Q. At that hearing, Mr. McBride, there were certain limits on the extent of your testimony, due to objections to your qualifications and the status that you held with your association. Do you recall that?

A. Yes I do.

Q. Subsequent to that hearing, have you taken the matter of this application up with your association and with some of its members?

A. Yes I have.

Q. Have you had any meeting?

A. We have had one meeting.

[fol. 359] Q. In addition to the meeting, have you talked the matter over with some of the individual members of your association who were not present at the meeting?

A. Yes I have.

Q. As a result of that meeting and your talks with some of your members, were you specifically authorized and directed to appear again at this further hearing and testify in support of this application on behalf of not only your association but the individual members?

A. Yes.

Mr. Lane: I object, Mr. Examiner. There is a proper way to qualify the witness. If he has written authorization——

Mr. Morken: I am coming to that part, Mr. Lane. I am not through with qualifying him.

Exam. Roberts: Let us see what he witness has to say.

By Mr. Morken:

Q. You have written authorization?

A. Yes.

Q. Will you describe, and without testifying as to anything relative to the application, will you tell the examiner about the meeting, how this proposal was laid out to the members, and specifically what members authorized you, in writing, to appear on their behalf? And one more question, do you have those authorizations with you?

A. Yes.

Q. And they are available for anyone who wants to see them?

[fol. 360] A. Yes.

Q. Will you tell what happened at this meeting and what was discussed and what you told the members relative to this proposal?

Mr. Lane: I object.

Exam. Roberts: What is the ground for your objection?

Mr. Lane: It is hearsay. I don't care what these people said. They are not here for cross-examination and I don't care what the subject matter was.

Exam. Roberts: He called in the witness and hasn't gone into any need for the service at this time.

Mr. Lane: May the question be read back?

Exam. Roberts: Will you read the question back, Mr. Reporter?

(The last question was read by the reporter.)

Mr. Lane: I think you will appreciate the reason for my objection.

Exam. Roberts: What proposal are you speaking of?

By Mr. Morken:

Q. What I want to know is; when the meeting was, who was present, and what you told them as far as this proposal is concerned. In other words, what you asked them to do or what they told you to do. Will you state when the meeting was held and who was there?

A. The meeting was on November 13, 1952 and the following granite manufacturing firms had officers present: [fol. 361] Grearson and Lane, Barre, Vermont; the Lawson Granite Company, Incorporated, Barre, Vermont; E. J. Batchelder Company, Incorporated, Barre, Vermont; Hoyt and Milne, Incorporated, Barre, Vermont; Buttura and Sons, Barre, Vermont; the Acme Granite Company, Barre, Vermont; Cook, Watkins and Patch, Incorporated, Barre, Vermont; Johnson and Gustafson, Barre, Vermont; The Barre Hickey Mill, Barre, Vermont; and the Adams Granite Company, Barre, Vermont.

At the November 13 meeting, I described to those members present the purpose of this hearing which I told them was to be held on December 2, 1952 in Washington. I described briefly the background of the previous hearing in St. Paul and told them that a continued hearing was to be held. At that meeting, Mr. Heber England, the president of Jones Brothers Company, and Mr. Nelson Wright, sales manager of the Rock of Ages Corporation, described the past experiences of their companies regarding rail shipment to the Midwest and to the Southwest.

At that meeting both Mr. England and Mr. Wright also described to the members present why their companies felt the proposed service by the Schaffer Transportation Company was and is essential to the continued sale of the Barre, Vermont granite in the sixteen state area.

At the conclusion of the meeting I asked the members that if the situation regarding rail service and the proposed motor carrier service, if the situation as described by Mr. [fol. 362] England and Mr. Wright applied also to their companies, and all present at the meeting indicated, by raising their hands, that the situation as described by Mr. England and Mr. Wright was approximately the same.

Mr. Lane: I will move to strike the last two sentences.

Exam. Roberts: Your motion will be denied. Proceed.

Mr. Lane: May I set forth the reasons for my objection?

Exam. Roberts: Yes.

Mr. Lane: On the ground of hearsay, the people of whom the witness speaks are not present in this hearing room for cross-examination.

Exam. Roberts: I believe Mr. McBride is trying to lay the foundation for something here and I am interested in finding out what it is. I will permit him to proceed.

The Witness: The form I have in front of me and I will read what I consider the pertinent parts for a moment.

Mr. Lane: If you are referring to a written document, I would like to examine it.

Exam. Roberts: I would like you to give your own knowledge. I don't know what that document is, and counsel has a right to investigate it and look at it.

Mr. Morken: If it is going to be investigated, I am willing to have one of them marked for identification as an exhibit and offered in the record so that, even though it is rejected, it will remain a part of the record as a rejected [fol. 363] exhibit.

Exam. Roberts: What I am trying to find out is just what Mr. McBride's position is as a witness and whom he proposes to represent. I don't think the record is clear on that. I think it was at the prior hearing and if there is any difference, I am willing to hear it. If it is the same position he took, I think we made the ruling on that.

The Witness: At the conclusion of this statement I think that might answer it.

The final paragraph of this form and the others states:

"I hereby designate R. T. McBride, Field Representative of the Barre Granite Association, to officially act as a representative of the Grearson and Lane Company and to testify in my behalf at any Interstate Commerce Commission hearing involving the present application of Schaffer Transportation Company."

Mr. Lane: Now may I examine the document?

Exam. Roberts: You may, sir.

Mr. Lane: Have you seen a copy of this, Mr. Examiner?

Exam. Roberts No I have not.

Mr. Lane: With regard to these alleged authorizations.

they are not notarized. There is not any means by which I can determine whether these are the signatures of these parties. This is a device to circumvent the rules of practice with regard to depositions.

[fol. 364] I requested a hearing in Montpelier, Vermont on this particular case. Counsel for applicant objected on the ground that under the rules of practice, the rail carriers could petition for leave to take depositions. In effect, this is an easy way of doing what the rules regarding the taking of depositions calls for. Only it doesn't conform to the rules. In effect, instead of having these witnesses come from Barre, Vermont to Washington, D. C. to testify, they merely give this man a letter and that is all it is, a letter. We had no chance to cross-examine these various witnesses.

By means of these letters, if Mr. McBride is successful in getting them into the record, it puts us in a position of not being able to find out the reasons for the support of these companies of this application. We were obliged to bring witnesses from St. Albans, Vermont and Rutland, Vermont to this proceeding here. If such a practice were permitted, it would be a simple thing to get letters from people all over the United States, particularly from the sixteen states involved in this application.

I object to any testimony with respect to these so-called authorizations going into this record.

Exam. Roberts: What testimony do you purport to give that you have not already given at the prior hearing with regard to these manufacturers who, I assume, are members of your trade association?

[fol. 365] The Witness: Primarily the fact that being present at this meeting as they were and hearing the statement by Mr. Wright, which incidentally is the same statement that is now on the record here, I believe he read to the members of that meeting, and Mr. England's were pretty much the same as the testimony he has given here today and I wish to testify that the other eighteen companies which I am representing assert that their position is the same and that this is not an isolated instance of two companies needing this service, but that actually possibly twenty-five to thirty companies in our district need this

service. I happen to have with me authorizations from eighteen of them.

Exam Roberts: Is that in substance your testimony with regard to it?

The Witness: Yes.

Exam. Roberts: Do you have any further questions, Mr. Morken?

Mr. Morken: Yes. I don't know where we stand with Mr. McBride but I think some of Mr. Lane's statements should be answered briefly.

First, at the last hearing, Mr. McBride was permitted to testify only about the movements that the Barre Guild made themselves in pool car shipments. He endeavored to say that they had the shipments, and on the objection that he had not discussed it with them personally and they [fol. 366] were not apprised of it and had not specifically authorized him to appear and testify, we went back and got just exactly waht he testified to. He has talked with members of his association and they discussed the proposal. He has the proposal here on which there is no testimony. There is nothing here that is hearsay. It is simply and purely an authorization. There is nothing wrong with it. As a matter of fact, it is all that he needs.

He has been questioned and shown his authorization and I don't think there is any objection to his being authorized by his manufacturers to do it. As far as what he is going to testify to, he is not going to talk about some peculiar knowledge that these individual shippers would have on any particular instance, such as a less than carload shipment that took three or four weeks. He is saying that his members have examined the proposal and know what it is about and know what the testimony is that was developed here and at St. Paul and here is an additional group of eighteen or twenty shippers who want to support this proposal and their position is the same as the men who already testified.

Exam. Roberts: That has been your testimony in so far as these shippers are concerned?

The Witness: Yes sir.

Exam. Roberts: You make your statement and you are finished as far as that statement is concerned.

The Witness: As far as that statement is concerned.
[fol. 367] Exam. Roberts: As far as their need for the service is concerned?
The Witness: Yes.
Exam. Roberts: Do you have any more questions?

By Mr. Morken:

Q. How many customers do these people that you represent have in this sixteen state area?

Mr. Lane: Objection.
Exam. Roberts: Off the record.

(Discussion off the record.)

Mr. Lane: I still object for the reason that I think this is highly improper.

By Mr. Morken:

Q. You know how many accounts or we call them monument or memorial dealers in these sixteen midwest states, these people you are speaking for serve.

A. The eighteen Barre, Vermont members who have signed these statements authorizing me to testify for them have given me verbal information stating that they have dealers totaling 1,034 in the sixteen state area. I might add that there is undoubtedly some duplication there. How many, we don't know exactly.

Q. More than one manufacturer in Vermont might serve the same Midwest dealer?

A. That is right.

Q. Do you know the tonnage that was shipped during the year 1951 by these Barre, Vermont manufacturers into [fol. 368] these sixteen midwestern states.

A. The source of this information is the monthly reports of the Barre Granite Association member companies. This is the total amount of pounds of Barre, Vermont granite shipped to the sixteen states for the period January 1, 1951 to January 1, 1952, and it is an approximation. It is approximately seventeen million.

Q. Would that figure include th——

Exam. Roberts: Is that tonnage or poundage?
The Witness: That is seventeen million pounds.

By Mr. Morken:

Q. Would that include the Rock of Ages figures and the Jones Brothers figures?

A. Yes.

Q. As part of your duties at the present time at the Barre Guild, is that the name of it?

A. The Barre Guild Consolidation Service.

Q. As part of your duties at the present time, are you assisting and working on building up these pool cars?

A. Yes, in my dealer contact as field representative for the Association, almost inevitably the matter of transportation is discussed when I speak with dealers, and I am always careful to inform as many dealers as I can that consolidated car service is available to them as in fact it actually is. By that I mean we have a limited number of break bulk points and many dealers are not served by [fol. 369] consolidated cars simply because they are not near enough to the break bulk cities.

Q. If this service is authorized, will the Barre Guild assist its members in arranging pool car load shipments?

A. If the authority is granted and because the Barre Granite Association is interested in seeing it granted, I am sure that the officials and members of the Barre Granite Association would do everything in their power to assist the members and make every possible use of the service as proposed.

Q. Prior to coming here to this hearing, did you inquire with any carriers or official body to determine what was the motor carrier service out of the Barre, Vermont area on granite to these midwestern states? Did you make such an inquiry?

A. Yes.

Q. Who did you inquire with?

A. On October 10th we received a letter from the Barre Granite Association, received a letter from a retail dealer in Hartford, Wisconsin.

Mr. Lane: May I see the document?

By Mr. Morken:

Q. Who did you inquire of to determine if there was motor carrier service from Barre, Vermont to these midwestern states?

A. The St. Johnsbury Trucking Company and the District Supervisor of the Interstate Commerce Commission, located at Lebanon, New Hampshire.

[fol. 370] Q. Did both of these companies answer your inquiries in service?

A. The conversation with the St. Johnsbury Company was a telephone conversation in which the clerk or dispatcher informed me that the——

Mr. Lane: Objection. And I move to strike.

Exam. Roberts: The objection is sustained. Do you know of your own knowledge?

By Mr. Morken:

Q. Do you know if the St. Johnsbury Trucking Company offers any service, either through or by connecting service from the Barre, Vermont area to the midwestern states?

A. I know they do not offer any through service.

Q. You did not inquire if they had direct service?

A. I was informed——

Mr Lane: Objection

Exam. Roberts: Of your own knowledge do you know if there was any?

The Witness: Of my own knowledge I do not know that there was any connecting service.

By Mr. Morken:

Q. Did the District Supervisor of the Interstate Commerce Commission of the Bureau of Motor Carriers advise you that there was any such service?

Mr. Lane: Objection.

Exam. Roberts: Overruled. What was the result of your conversation with the Interstate Commerce Commission District Officer?

[fol. 371] The Witness: The District Supervisor wrote me a letter on October 24th.

By Mr. Morken:

Q. What did he say?

Mr. Lane: Objection.

Mr. Morken: On what grounds?

Exam. Roberts: I asked the witness what was the result of his investigation with the District Office. What was the result?

The Witness: The District Supervisor advised me that he was not aware of any direct truck through service to the area which I mentioned in my letter, and he said he doubted that such service existed.

Mr. Lane: I move to strike the witness's answer.

Exam. Roberts: The latter part of that answer may be stricken. Please continue.

By Mr. Morken:

Q. Of your own knowledge, is there any direct motor carrier service from Barre, Vermont to these midwestern states?

A. No, not of my own knowledge.

Q. The Examiner asked about the area that is involved where granite originates and I believe he said something about Barre, Vermont and five miles. Would a five mile circle around the town of Barre, Vermont cover the source of supply of this granite?

[fol. 372] A. No it would not.

Exam. Roberts: I was speaking of a particular shipper there.

By Mr. Morken:

Q. Are the sources of supply of this granite located in one county?

A. All are located in one county with the exception—and that county, incidentally, is Washington County, Vermont—with the exception of the town of Williamstown, and that is located in Orange County, Vermont.

Q. Other than this Barre, Vermont granite and the point of Williamstown, are there other sources of supply of granite and building stone in Vermont?

A. Yes.

Mr. Morken: You may inquire.

Cross-examination.

By Mr. Lane:

Q. When you say building stone, do you refer to granite only?

A. No.

Q. You have nothing to do with the shipment of marble?

A. No.

Q. Marble originates in another part of the state, isn't that so?

A. Yes.

Q. In the Rutland area?

A. Yes.

[fol. 373] Q. And your members have nothing to do with those quarries?

A. No.

Q. Mr. McBride, how many members were represented at this meeting of November 30, 1952?

A. I believe nine, Mr. Lane, ten.

Q. As a result of your efforts after you secured authority from nine of those members, you went out and solicited authority from others?

A. At the time I called the meeting I sent the notice to approximately twenty and ten could be present so I personally went to the offices of the other ten, told them exactly what transpired at the November 13th meeting, and asked them the same question I had asked at the meeting.

Q. At the meeting of November 13th was the entire membership invited?

A. No.

Q. How many members are there in the Association?

A. Seventy-five.

Q. And only ten were invited to this meeting?

A. No, approximately twenty were invited.

Q. Of those ten who were present, did they constitute a quorum according to the rules of your Association?

A. This was not a meeting of the Association.

Q. This was a meeting of the selected members who happend by chance to be members of the Association, is that correct?

[fol. 374] A. It was a meeting of manufacturers who, from our records, we knew shipped granite into the sixteen state area.

Q. There was no official act of the Association authorizing you to appear here?

A. I am the official field representative of the Barre Granite Association. I need no such meeting to have me represent the Barre Granite Association. I have authorization to represent the individual matters.

Q. In matters of good will and sales?

A. In this case and in the matter of the Schaffer Transportation Company.

Q. Do you have written authorization from the Association authorizing you to appear on behalf of the individual members?

A. No, I have authority from the individual members.

Q. You have authorization from eighteen members?

A. Yes.

Q. Individuals?

A. Yes.

Q. Did you say that you represented Cook and Watkins?

A. Yes.

Q. Where do they ship to?

A. Cook and Watkins are one of the eighteen Barre manufacturers who were represented at the November 13th meeting. As I stated a minute ago, our records and our Association showed that they shipped granite to one or more of the sixteen states.

[fol. 375] Q. I want to make this as short as possible. I don't like to prolong this record. If I asked you specific questions about these eighteen manufacturers whom you purport to represent with regard to destination, tonnage to specific destinations, methods of transportation being used at the present time, the split between pool car, full carload, and less than carload, questions of that nature,

would you be able to stand cross-examination and answer me in a responsive manner?

A. I think I would attempt to to the best of my knowledge.

Q. Where do Cook and Watkins ship to in the sixteen states involved in this application?

A. I don't have that specific information.

Q. If I asked you the same questions about the other seventeen manufacturers, would your answers be the same?

A. Yes, I would not have that specific information.

Q. If I asked you about the present tonnage, how it was split up according to carload, less than carload and pool carload, would you be able to give me the answers?

A. I have that information only in total, not for a specific company.

Q. Do you know whether any one of these eighteen manufacturers would utilize the services of this applicant if his published tariff was in existence on rail, less than carload, rates?

Mr. Morken: I object. It is immaterial.

Exam. Roberts: The objection is overruled. He may [fol. 376] answer if he knows.

By Mr. Lane:

Q. Why didn't you investigate interline truck service from the Barre, Vermont area to these sixteen destination states, interline motor carrier service?

A. Because we knew of none available and after receiving the response from the St. Johnsbury Trucking Company and the Interstate Commerce Commission, it appeared that there was no practical interline service available.

Q. You heard Mr. Nelson Wright testify that he was presently utilizing a carrier as far west as Buffalo, New York, did you not?

A. I didn't understand your question.

Q. You heard Mr. Nelson Wright testify that his company used a motor carrier service as far west as Buffalo, New York?

A. Yes.

Q. Do you know whether or not there are motor carriers

who provide service from Buffalo, New York to these sixteen destination states?

A. I know of no service, no interline service.

Q. What inquiry did you make as to motor carrier service available beyond Buffalo?

A. I know of the St. Johnsbury Trucking Company.

Q. Was that the extent of your inquiry?

A. Yes, and the Interstate Commerce Commission.

Q. The St. Johnsbury Trucking Company were the only [fol. 377] ones you contacted. Did the St. Johnsbury Trucking Company or any other trucking company refuse to handle granite on an interline basis to any of these sixteen destination states?

A. Not that I know of.

Q. You know as a practical matter, don't you Mr. McBride, that even though through rates may not be in effect, you can move the granite from Barre, Vermont to any of these destination states on a combination of local rates?

A. I knew that no such service was available.

Q. Didn't you appear at Columbus, Ohio last June?

A. Yes.

Q. You knew what the situation was in effect at that time, did you not, particularly with respect to L. and F. Hauling Company?

A. I heard the testimony of the representative of the local Columbus organization who, among other things, testified he had hauled marble from Vermont was in error, and he also stated he had hauled granite from Barre, Vermont to some farm building and the granite was Deer Isle granite.

Q. Did you testify in the L. and F. Hauling case?

A. No.

Q. What case did you testify in?

A. The Kanuckel case. I testified in the Kanuckel case.

Q. While you were present at Columbus, did you hear the testimony with regard to L. and F. transporting granite from Buffalo and interlining the granite with western carriers at that point.

[fol. 378] A. I don't recall that testimony. I recall the case. They were hauling to the Buffalo area.

Q. You represent manufacturers who ship to the Midwest, do you not?

A. Yes.

Q. Do you know that Kanuckel has been hauling to the Midwest from Barre, Vermont?

A. Not that I know.

Q. Didn't you testify in support of his application?

A. I wasn't—no, he wasn't hauling then, that I know of.

Exam. Roberts: Please answer the question. Do you understand the question?

The Witness: I understand that he is asking me if Mr. Kanuckel is hauling granite to the Midwest from Barre, Vermont, and I said I don't know that.

Exam. Roberts: You say you don't know that?

The Witness: No.

By Mr. Lane:

Q. Do you know whether or not Daniel Hill of Northfield, Vermont has been hauling from Barre, Vermont to Midwest points?

A. I knew that he was hauling granite to the Ohio area and the only other information I have about it is that at one time the Barre Granite Association was informed that Mr. Hill's rights had been rejected or revoked or denied [fol. 379] and he was no longer eligible to haul, and I know of no further hauling that he is doing.

Mr. Lane: That is all I have.

Exam. Roberts: Are there any questions, Mr. Metzler?

Mr. Metzler: No.

Redirect examination.

By Mr. Morken:

Q. Is this granite your people ship the kind of a commodity that can be rehandled and juggled from one trailer to another easily?

A. No. Usually because of its size and weight.

Q. Is it also subject to damage in this rehandling?

A. Yes.

Q. If there was such a service as Mr. Lane seems to be trying to leave the impression that there is, that one carrier can haul it to Buffalo and transfer it, that it can be interlined with another carrier going to Canada or Ohio or Kentucky, would that help or satisfy any of the needs that you have testified about in this proceeding in so far as the State of Illinois or any of the midwestern states are concerned?

A. Any discussion we have had along that line among the members, and my discussion with the dealers, I can think of only one dealer who suggested that the Barre industry attempt to find interline carriers. They don't appear to be interested in wanting interline carriers. They badger us and write to us and talk to us about direct line service.

[fol. 380] Mr. Morken: That is all.

Recross-examination.

By Mr. Lane:

Q. Do you know one of your members has received three day service on interline shipment from Buffalo on granite originating in Barre, Vermont?

Mr. Morken: Destination where?

Mr. Lane: Destination Ohio.

Mr. Morken: Objection. It is outside the scope of this application.

Exam. Roberts: The objection is overruled.

The Witness: No I don't know.

Mr. Lane: That is all.

Exam. Roberts: You may be excused.

(Witness excused.)

Mr. Morken: The applicant rests.

Exam. Roberts: Do the intervenors or protestants have any testimony to offer at this time.

Mr. Lane: I do. I call Mr. Keenan.

T. L. KEENAN was sworn and testified as follows:

Direct examination.

By Mr. Lane:

Q. State your name, sir.
A. T. L. Keenan.
Q. With what firm are you connected?
A. Central Vermont Railway, Incorporated.
[fol. 381] Q. With headquarters where?
A. St. Albans, Vermont.
Q. In what capacity are you employed by them?
A. I am chief of the Tariff Bureau in the Freight Traffic Department.
Q. How long have you been in the Freight Traffic Department of the Central Vermont Railroad?
A. Approximately thirty-three years.
Q. Is your company opposed to this application?
A. Yes sir.
Q. Why, bearing in mind that this applicant seeks authority to transport manufactured and rough granite from all points and places in Vermont to sixteen destination states outlined by the Examiner at the start of the hearing.
A. Central Vermont Railway is opposed to this application, having in mind the scope of the authority sought, in view of the fact that at four of its stations in Vermont; namely, Barre, Montpelier, Northfield and Waterbury, Vermont, granite originates and is shipped by Central of Vermont Railway and its connections or is transported by Central of Vermont Railway from those four stations titled in regular and substantial movements to the destination territory.
Q. Are through rates and routes in effect on this traffic from the Barre, Vermont area and those four points you mentioned to the destination points here involved?
[fol. 382] A. Yes they are.
Q. Is your company able to take care of any additional traffic from this area?
A. Yes.
Q. You do not have a shortage of cars?

A. No.

Q. Does your company maintain a solicitation force?

A. Yes.

Q. Seeking to increase its business?

A. Yes sir.

Q. Do you regard the granite traffic as being desirable?

A. Very desirable, yes sir.

Q. In your opinion, if this application is granted, would it have an adverse effect upon your company?

Mr. Morken: I object. It is an improper foundation.

Exam. Roberts: The objection is overruled.

The Witness: I do.

By Mr. Lane:

Q. Does your company have competition in the transportation of granite?

A. Very keen.

Q. In the motor carrier competition, do you know whether or not motor carriers have arrangements for interchange of trailers?

A. Yes sir.

Q. You have been present throughout the hearing today, have you not?

[fol. 383] A. I have.

Q. Have there been any complaints regarding this granite traffic?

A. To my knowledge we have had no complaints on the handling in the four states mentioned to the destination territory included in this application.

Q. With respect to this particular traffic, your line is in competition, is it not, with the Barre and Chelsea Railroad?

A. That is right, sir.

Q. And you have motor carrier competition?

A. We are in competition at Barre and Montpelier with them and in Northfield and Waterbury local stations. The joint stations are common points with the Barre and Chelsea.

Q. On traffic to these destination states, what are your principal points of interchange?

A. We interchange with the Canadian National Railway at East Alburgh, Vermont and that is again interchanged at Port Huron, Michigan, a connection with the Grand Trunk Western line into the Chicago area for connecting carriers beyond Chicago.

Q. Do you have anything further to say with regard to this application?

A. We feel that——

Mr. Morken: I submit he should be asked a specific question.

[fol. 384] Exam. Roberts: I will sustain the objection.

By Mr. Lane:

Q. I asked you a question a few moments ago about adverse effects. Will you tell the Examiner why, in your opinion, this application would have an adverse effect?

Mr. Morken: Object. It is repetitious.

Exam. Roberts: The objection is overruled.

The Witness: Will restate the question?

By Mr. Lane:

Q. Will you tell the Examiner why the granting of this application, in your opinion, will adversely affect your company?

A. It will enhance the keen competition of which I spoke a few minutes ago, which is presently occasioned by Barre and Chelsea Railroad and other rail routes, plus certificated motor carrier operations, and this will be just one more if the certificate is granted.

Q. There has been some discussion or some testimony heretofore with regard to monuments and markers. Does your company also handle building granite?

A. Well, our experience has been that the preponderance of the granite that moves from our stations is the monument variety. It is either moved—and of that preponderance the greater portion by far is the finished products and the rough constitutes a certain percentage, but I would say it is all monumental stone from the Barre, Vermont area.

Mr. Lane: Thank you very much. You may inquire.

[fol. 385] Cross-examination.

By Mr. Morken:

Q. I believe you and one other witness are the only two here from the railroads, is that correct?

A. I speak for my own company. I do know of no representative from the Rutland here.

Mr. Lane: There were a number of railroad representatives at the previous hearing.

Mr. Morken: Yes, and I am talking only about today.

By Mr. Morken:

Q. Your counsel has inferred in great detail these other carriers you mentioned in competition and I want you to mention one carrier or the carriers, if there is more than one, that hauls this stone from the Barre, Vermont area to any one of the sixteen midwestern states that are involved here. Name me the carrier that is involved in competition.

A. I know of no single line.

Q. Name me the connecting carriers.

A. L. and F. Hauling.

Q. What states does it serve?

A. Ohio, they go over the Niagara-Buffalo frontier and I know from reading the transcript of the other hearing that they interchange beyond the Buffalo area.

Q. To what points?

A. Illinois and Ohio specifically.

Q. You have known about this application that has been filed for almost a year now?

[fol. 386] A. I know it has been filed.

Q. And I gather this is a matter of quite some importance to railroad?

A. Yes, sir.

Q. You made quite an investigation about it?

A. Yes.

Q. First, can you show me one instance of one consignee

in th Midwest where you have lost one pound of tonnage due to this truck movement that you claim exists?

A. I said we are——

Q. Can you name one consignee where you have lost one pound of tonnage due to this competitive truck service that you are talking about?

A. It is reflected on our overall picture.

Q. Can you answer the question?

A. I don't know of any one specific item.

Q. You have known about it for over a year?

A. I have known about it for several years that our tonnage is decreasing.

Q. The application here. You have known about it for a year?

Mr. Metzler: He doesn't have to answer that trick question.

Exam. Roberts: That is not a trick question.

The Witness: I don't know of any.

By Mr. Morken:

Q. Is there any?

[fol. 387] A. There will be potential in the territory which he desires to serve.

Q. Do you think that Mr. England or Mr. Wright are wrong that such a service will build up the amount of granite moving from Barre and moving from that area and make more business for everyone?

Mr. Lane: It is not incumbent upon this witness to characterize the testimony of Mr. England or Mr. Wright.

Mr. Morken: If he is afraid to answer the question——

Mr. Lane: It is an improper question.

Exam. Roberts: I will overrule the objection. Proceed. Will you answer the question?

The Witness: What was the question?

Exam. Roberts: Read the question, Mr. Reporter.

(The last question was read by the reporter.)

The Witness: No, I don't think it will.

By Mr. Morken:

Q. Did you prepare any type of an exhibit—assume that Mr. Schaffer hauled a truckload of granite every day—did you prepare an exhibit to show what financial effect that would have on your railroad?

A. No.

Q. Do you think it will hurt your railroad?

A. Certainly.

Q. You did not present any figures along that line and did not bring any along to show that.

[fol. 388] A. There is no yardstick of comparison because Mr. Schaffer is not operating today.

Exam. Roberts: Your answer could be yes or no. You made no compilation of figures?

The Witness: No I didn't.

By Mr. Morken:

Q. Who are these carriers who are interchanging equipment that you are testifying about?

A. Interchanging where? I don't understand.

Exam. Roberts: I don't think he said he knew of any carrier.

The Witness: I said I knew of the L. and F. Hauling to Buffalo.

By Mr. Morken:

Q. Then you are not aware of any carriers interchanging at Buffalo?

A. It is going beyond Buffalo. L. and F. Hauling and it is transferred for hauling beyond.

Q. Is it a physical interchange of the equipment rather than of the lading?

A. I don't know.

Q. As chief of the Tariff Bureau, do you call on any of your shippers or solicit their business?

A. No I do not.

Q. Do you have anything to do with arranging the train schedules or the service?

A. That wouldn't come under the heading of the Freight Traffic Department.

[fol. 389] Q. In the past say three or four or five years, what has the Central of Vermont Railway done to expedite less than carload service on shipments moving to say Minneapolis and St. Paul?

A. They have done all possible to expedite it.

Q. How have you changed your service?

A. We made additional house cars, merchandise cars in less than carload lots.

Q. That is on general commodity freight?

A. Yes.

Q. Not in the granite?

A. Granite goes in it.

Q. Granite moves in those cars?

A. General commodities without exceptions.

Q. If the granite moves in regular merchandise cars——

A. Yes.

Q. And you have increased the number of cars on your railroad to handle less than carload, and do I infer that your business has been increasing in the last three or four years?

A. Not in less than carload, no.

Q. It has been decreasing?

A. It has been decreasing.

Q. But you have increased the number of cars?

A. We have endeavored to improve the service at the interchange points.

[fol. 390] Q. Do you think you have improved over them?

A. We have done the best we can.

Q. What was the service then before these two and three and four week deliveries that the witnesses testified about? Was it slower than that before?

A. I don't know what specific territory you are speaking of, sir. I heard one statement that was seven days——

Q. There were shipments to the State of Iowa that went in February of 1951 and were delivered in March. That took three weeks, and there was a movement, another shipment to the State of Iowa or Illinois on December 21st that was delivered on the 14th of January. That took three weeks. Do you recall that testimony?

A. I do and I would have to know the specific route the traffic followed.

Q. My only comment is that you say you have improved your service. Was it worse than that before?

Exam. Roberts: Let us find out whether the shipment moved over that line. I understand there is more than one line operating out of there. See whether his line handled this shipment.

By Mr. Morken:

Q. Do you recall who originated those shipments?

A. As I recall, I believe the Barre and Chelsea was the originating railroad.

[fol. 391] Q. Is your service better than theirs? Or about the same?

A. I would say it is approximately the same.

Q. If your service approximates that, again, if these deliveries take two and three weeks at the present time, what was it three years ago before you improved on it?

A. I don't know, sir.

Mr. Lane: I object.

Exam. Roberts: The objection is sustained. Proceed.

By Mr. Morken:

Q. I gather from your position that this granite moves by truck at the present time, but there must be some need for truck service or these people wouldn't use it, is that correct?

A. I am not in a position to answer that.

Mr. Morken: I have nothing further.

Redirect examination.

By Mr. Lane:

Q. Mr. Keenan, I don't know whether I got your answer correctly in response to a question on cross-examination concerning your opinion of the testimony of Mr. Wright and Mr. England. Would you clarify that?

A. I said I am not in a position to confirm or contradict what they said. I am not a granite manufacturer.

Q. In other words, they are entitled to their own opinion and you are entitled to yours, is that the answer?

A. Yes.

Mr. Lane: That is all.

[fol. 392] Exam. Roberts: Is there any recross-examination?

Mr. Morken: No.

Exam. Roberts: You may be excused.

(Witness excused.)

Exam. Roberts: We will take a five minute recess.

(A short recess was taken.)

COLLOQUY BETWEEN EXAMINER AND COUNSEL

Exam. Roberts: Come to order, please. Is there any further evidence by protestants at this time?

Mr. Lane: Yes sir. Mr. Examiner, I am probably going to make the testimony of Mr. Helperin rather brief. I don't know that the testimony is even necessary.

His company serves the marble producing area of the western side of Vermont. From what I have been able to observe of the testimony at the previous hearing in the transcript and on hearing the testimony today, I don't know if it will be necessary to mention marble.

Exam. Roberts: Off the record.

(Discussion off the record.)

Mr. Morken: If it please the Examiner, I would like to amend the application in so far as it involves the request for authority from Vermont back to these sixteen mid-western states, to exclude the request for building stone so that the application as amended will read "Granites, manufactured and rough, from Vermont to these various states."

Mr. Lane: I have no objection to the amendment offered [fol. 393] in as much as it restricts the scope of the application without changing the jurisdiction.

Exam. Roberts: As I understand it, this is a further amendment. There were amendments at the previous hearing.

Mr. Morken: Yes, as respects some other commodities.

Exam. Roberts: As I understand it, you are now willing to further amend the application to restrict the commodities originating in Vermont to granite only and not building stone.

Mr. Morken: That is correct.

Exam. Roberts: The further amendment will be granted.

Mr. Lane: In view of that amendment by Mr. Morken and your acceptance of it, Mr. Examiner, I am not going to put Mr. Helperin of the Rutland Railroad on the stand, and protestants rest.

Exam. Roberts: Do you have any evidence, Mr. Metzler?

Mr. Metzler: In view of the evidence that developed at today's hearing by Mr. Morken in reference to the consignees in midwestern territory and the handling of those shipments by these intermediate destination carriers, I am going to make a request that there be a continued hearing either at Chicago or St. Paul to establish such facts through railroad and other witnesses.

Exam. Roberts: Your request for a continued hearing will be denied, Mr. Metzler. Is there any further evidence?

Mr. Metzler: I would like to direct Examiner's atten-[fol. 394] tion Docket MC–16903. Those were the Moon and Sims applications which involves the same commodities involved here; namely, hauling stone over long distances and both were denied in November of 1951 by Division 5.

I would like to direct the Commission's attention to those as I think they are a recent expression in point.

Mr. Morken: Isn't that a matter of argument?

Mr. Metzler: No.

Exam. Roberts: Off the record.

(Discussion off the record.)

Exam. Roberts: The record will stand on its merits.

Do you gentlemen desire to file briefs?

Mr. Metzler: No desire to file a brief, Mr. Examiner.

Exam. Roberts: Hearing no request for filing of briefs, the hearing is closed.

(Whereupon, at 2:52 o'clock p.m., the hearing was closed.)

[fol. 396] APPLICANT'S EXHIBIT NO. 1

Application of A. W. Schaffer, d/b/a
Schaffer Transportation Co.
Docket MC 93529 Sub 2

APPENDIX "D"

Applicant is operating at present, as follows:

IRREGULAR ROUTES:

Granite,

From points and places in Grant County, S. Dak., to points and places in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York.

Silican carbide,

From Niagara Falls, N. Y., to points and places in Grant County, S. Dak.

Steel Shot,

From Mansfield, Ohio to points and places in Grant County, S. Dak.

Polishing Stucco,

From Fort Dodge, Iowa, and Chicago Heights, Ill., to points and places in Grant County, S. Dak.

Return with no transportation for compensation except as otherwise authorized.

[fol. 397] APPLICANT'S EXHIBIT NO. 2

Application of A. W. Schaffer, d/b/a
Schaffer Transportation Co.

Docket MC 93529 Sub 2

Applicant is operating at present, as follows: MC 93529

REGULAR ROUTES:

General commodities,

From St. Paul, Minn., to Milbank, S. Dak.:

From St. Paul over U. S. Highway 12 to Milbank.

Service is authorized from the intermediate point of Minneapolis, Minn., restricted to pick-up only; and the off-route point of Revillo, S. Dak., restricted to delivery only.

Livestock, empty barrels, drums, baskets, crates, and *boxes,*

From Milbank, S. Dak., to South St. Paul, Minn.:

From Milbank over U. S. Highway 12 to St. Paul, Minn., thence over city streets and connecting highways to South St. Paul.

Service is authorized to intermediate and off-route points of Minneapolis and St. Paul, Minn., restricted to delivery only; and from those in South Dakota within 25 miles of Milbank, restricted to pick-up only.

Twine,

From Stillwater and Duluth, Minn., to Milbank, S. Dak., as follows:

From Stillwater over Minnesota Highway 212 to Minneapolis, Minn., thence over U. S. Highway 212 to junction U. S. Highway 75, thence over U. S. Highway 75 to Madison, Minn., and thence over unnumbered highways to Milbank (also from Minneapolis over U. S. Highway 12 to Milbank).

From Duluth over U. S. Highway 61 to Sandstone, Minn., thence over Minnesota Highway 23 to St. Cloud, Minn., thence over U. S. Highway 52 to Sauk Center, Minn., thence over Minnesota Highway 28 to Graceville, Minn., thence over U. S. Highway 75 to Ortonville, Minn., and thence over U. S. Highway 12 to Milbank.

From Duluth over U. S. Highway 61 to St. Paul, Minn., thence over U. S. Highway 12 to Milbank.

Service is not authorized to or from intermediate points.

Service is authorized to the off-route point of Revillo, S. Dak., restricted to delivery only.

fol. 398] Return with no transportation for compensation except as otherwise authorized, over the above-specified routes to the above-specified origin points.

REGULAR AND IRREGULAR ROUTES:

General commodities,

From St. Paul, Minn., to Milbank, S. Dak.:

From St. Paul over U. S. Highway 212 to the Minnesota-South Dakota State line, thence over irregular routes to Milbank.

Service is authorized from the intermediate point of Minneapolis, restricted to pick-up only; and to the off-route point of Revillo, S. Dak., restricted to delivery only.

Livestock, empty barrels, drums, baskets, crates, and *boxes,*

From Milbank, S. Dak., to South St. Paul, Minn.:

From Milbank over irregular routes to the South Dakota-Minnesota State line, thence over U. S. Highway 212 to St. Paul, and thence over city streets and connecting highways to South St. Paul.

Service is authorized to the intermediate and off-route points of Minneapolis and St. Paul, restricted to delivery only; and from those in South Dakota within 25 miles of Milbank, restricted to pick-up only.

Return, with no transportation for compensation except as otherwise authorized, over the above-specified regular and irregular routes to the above-specified origin points.

IRREGULAR ROUTES:

Emigrant movables,

Between Milbank, S. Dak., and points and places in South Dakota within 25 miles of Milbank, on the one hand, and, on the other, points and places in Minnesota.

[fol. 399] APPLICANT'S EXHIBIT No. 3

ORDER IM-141-D

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 22nd day of June, A. D., 1951

No. MC 93529 SUB 2

A. W. SCHAFFER,
REVILLO, SOUTH DAKOTA

Upon consideration of petition duly filed:

It appearing, That application has been duly filed in this proceeding by A. W. Schaffer, and that applicant has advised this Commission that he desires to use the trade name SCHAFFER TRANSPORTATION CO.: and has requested that said application be amended to reflect the use of said trade name;

It further appearing, That the use of the trade name requested does not involve a change in the ownership of the operating rights of the applicant, therefore,

It is ordered, That the said application be, and it is hereby amended to show the name and trade name of the applicant as follows:

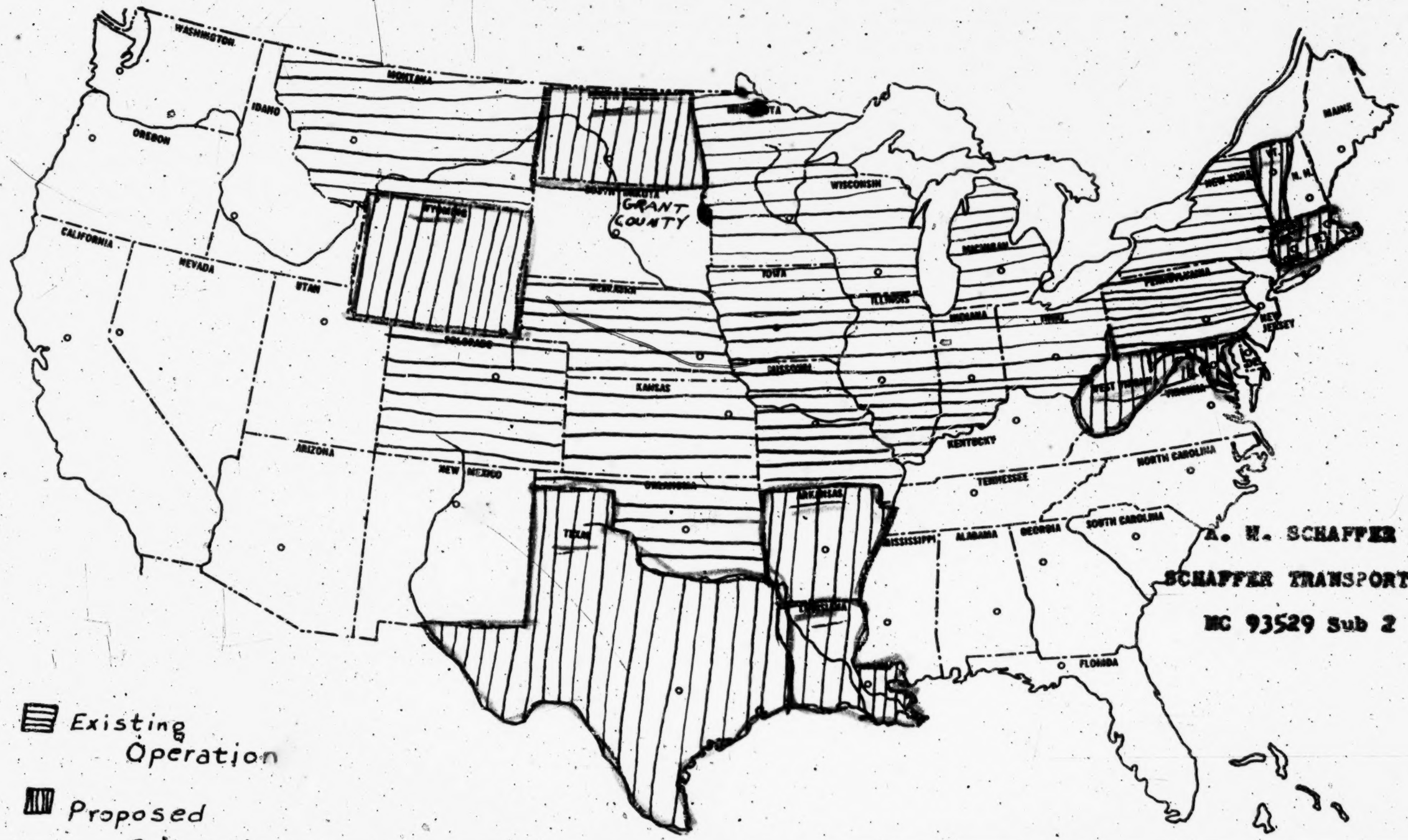
A. W. SCHAFFER,
DOING BUSINESS AS SCHAFFER TRANSPORTATION CO.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

Granite - From Grant County, South Dakota to points and places in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Washington, D. C., Texas, Arkansas, Louisiana, Wyoming and North Dakota.



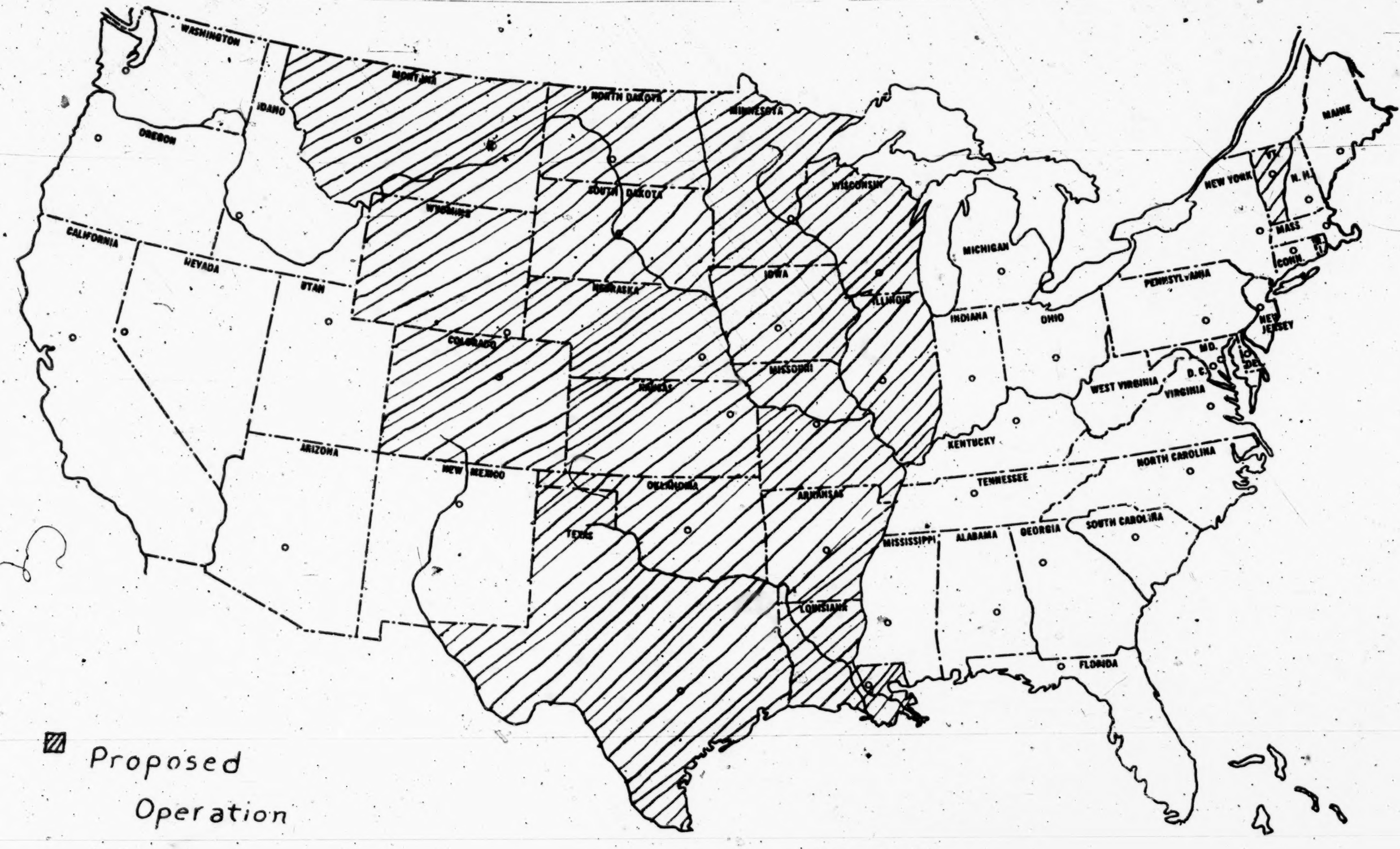
A. N. SCHAFFER d/b/a
SCHAFFER TRANSPORTATION CO.
MC 93529 Sub 2

APPENDIX "C"

[fol. 401] APPLICANT'S EXHIBIT No. 5

(See Opposite) ☞

Granite - From Vermont to points and places in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas and Louisiana.



APPENDIX "C"

[fol. 402] APPLICANT'S EXHIBIT No. 6

Application of A. W. Schaffer, d/b/a Schaffer Transportation Co.

Docket MC 93529 Sub 2

APPENDIX "A"

Unit No.	Equipment	License No.
51	1948 F8 Ford Tractor	26T826
	1948 Trailmobile tand. trailer	26–9011
52	1948 F8 Ford Tractor	26T825
	1948 Trailmobile tand. trailer	26–9010
53	1948 F8 Ford Tractor	26T824
	1945 Kentucky tand. trailer	26–9012
4	1948 F8 Ford Tractor	26T823
	1947 Fruehauf single axe trailer	26–8002
58	1948 F8 Ford Tandem truck	26T822
49	1949 F7 Ford Tractor	26T821
	1937 Trailmobile single axe trailer	26–8001
101	1950 F7 Ford Tractor	26T819
	1945 Wilson single axe trailer	26–9013
7	1946 Reo Tractor	26T828
102	1949 Chev Tractor	26T407
	1941 Fruehauf single axe trailer	26–9004
	1951 Mercury Car	26–R90
	1941 Chev Stock Truck	26T827

[fol. 403] APPLICANT'S EXHIBIT NO. 7

SCHAFFER TRANSPORTATION CO.

Docket MC-93529 Sub 2

BALANCE SHEET

December 31, 1951

ASSETS:			
Cash		$ 821.46	
Accounts Receivable		1,641.60	$ 2,463.06
Trucking Equipment & Cars		$61,820.66	
Less Depreciation Reserve		39,095.54	$22,725.12
Farm Equipment		$ 9,031.85	
Less Depreciation Reserve		4,805.41	$ 4,226.44
Farm			$ 9,000.00
TOTAL ASSETS			$ 38,414.62
LIABILITIES:			
CURRENT:			
Rozum Motor Company		$ 200.00	
Independent Direct Service		100.00	
Maynes & Company		150.00	
S & B Motor Supply		260.00	
Social Security		252.63	
Employment Security		191.09	
Employment Security (federal)		98.21	
Mortgage Payable		522.00	
TOTAL CURRENT LIABILITIES			$ 1,773.93
LONG TERM:			
Note Payable at $200 month		$ 1,200.00	
Mortgage Payable at $306 month		6,875.00	
Mortgage Payable at $200 month		3,000.00	
Mortgage Payable (Farm) semi-annual		3,600.00	
TOTAL LONG TERM LIABILITIES			$14,675.00
TOTAL LIABILITIES			$ 16,448.93
NET WORTH DECEMBER 31, 1951			$ 21,965.69

[fol. 404] SCHAEFFER TRANSPORTATION CO.

Docket MC-93529 Sub 2

OPERATING STATEMENT 1951

INCOME:

Granite Truck Lease	$ 9,357.62		
Granite Truck Haul Granite	49,881.16		
Granite Truck Backhaul	19,736.49		
C.O.D. Fees Collected	47.63	$79,022.90	
Grain & Salt Truck Grain	47,422.38		
Grain & Salt Truck Salt	31,096.42		
Grain & Salt Truck Grain Haul	3,823.36	$82,342.16	
Freight Truck Hauling		$15,048.21	
Insurance on Wrecked Truck		$ 2,500.00	$178,913.27

EXPENSES:

Gas & Oil	$29,465.55		
Repair & Upkeep	7,855.98		
Tires	11,972.73		
Labor	34,081.14		
Social & Employment Security	1,183.89		
Office Supplies	446.85		
Float & Exchange	129.06		
Tolls & Fines	2,143.17		
Damage Claims	906.31		
Lease	6,167.24		
Grain	38,201.68		
Salt	15,965.28		
Feed	338.00		
Workmen's Compensation Insurance	688.04		
Promotional & Sales	510.00		
Phone	1,530.61		
Licenses, Compensation Plates	4,117.36		
Filing Fees, Permits, Mileage	1,070.47		
Cargo & Liability Insurance	5,627.01		
Building Contents Insurance	40.13		
Loading	1,089.51		
Interest & Insurance	1,205.96		
Power	211.92		
Heat	205.05		
Garage Rent	430.00		
Miscellaneous	93.35		
Charged Off Accounts	512.57		
Depreciation	11,880.28		$178,069.14
NET INCOME FROM TRUCKING OPERATIONS			$ 844.13

[fol. 405]

SCHAFFER TRANSPORTATION CO.

Docket MC-93529 Sub 2

FARM OPERATING STATEMENT 1951

INCOME:		
Grain	$6,922.56	
Patronage Dividends	46.05	$6,968.61
EXPENSES:		
Seed	$ 871.82	
Machine Hire	257.00	
Supplies	71.40	
Repair & Maintenance	436.19	
Fuel	709.87	
Taxes	294.74	
Interest	168.67	
Phone & Power	115.46	
Depreciation	888.11	$3,813.26
NET INCOME		$3,155.35

[fol. 406]

SCHAFFER TRANSPORTATION CO.

Docket MC-93529 Sub 2

OPERATING STATEMENT 1951
GRANITE TRUCKS

INCOME:		
Lease	$ 9,357.62	
Granite	49,881.16	
Backhaul	19,736.49	
C.O.D. fees	47.63	$79,022.90
EXPENSES:		
Gas & Oil	$21,360.44	
Parts	6,916.11	
Tires	8,611.50	
Labor	19,170.84	
Social Security & Employment Security	671.00	
Tolls & Fines	1,324.65	
Claims	293.18	
Lease	6,167.24	
Workmen's Compensation Insurance	448.36	
Office Expense	1,126.91	
Promotional	135.00	
Phone	757.00	
Loading	294.75	
Cargo & Liability Insurance	2,824.30	
Licenses, Compensation Plates, fees	2,027.83	
Interest	605.96	
Depreciation	7,000.00	
Miscellaneous	93.35	$79,828.42
NET LOSS		$ 805.52

[fol. 407]

SCHAFFER TRANSPORTATION CO.

Docket MC-93529 Sub 2

OPERATING STATEMENT 1951

GRAIN & SALT TRUCKS

INCOME:		
Grain	$47,422.38	
Salt	31,096.42	
Grain Hauling	3,823.36	$82,342.16
EXPENSES:		
Gas & Oil	$ 4,493.36	
Parts	774.82	
Tires	2,871.01	
Labor	3,355.17	
Social Security & Employment Security	108.44	
Tolls & Fines	694.02	
Grain	38,201.68	
Salt	15,965.28	
Feed	338.00	
Workmen's Compensation Insurance	67.10	
Office Expense	1,450.00	
Promotional	290.00	
Phone	620.61	
Loading	250.00	
Cargo & Liability Insurance	2,240.00	
Licenses, Compensation Plates, fees	2,650.00	
Depreciation	4,000.00	
Interest	600.00	$78,969.49
NET PROFIT		$ 3,372.67

[fol. 408]

SCHAFFER TRANSPORTATION CO.

Docket MC-93529 Sub 2

OPERATING STATEMENT 1951

FREIGHT TRUCKS

INCOME:		
Freight		$15,048.21
EXPENSES:		
Gas & Oil	$3,611.75	
Parts	370.39	
Tires	490.22	
Labor	3,554.00	
Social Security & Employment Security	124.40	
Fines	124.50	
Damage Claims	613.13	
Workmen's Compensation Insurance	71.08	
Office Expense	736.00	
Promotional	85.00	
Phone	153.00	
Loading	544.76	
Cargo & Liability Insurance	562.71	
Licenses, Compensation Plates, fees	510.00	
Depreciation	880.28	$12,431.22
NET PROFIT		$ 2,616.99

[fol. 409] APPLICANT'S EXHIBIT No. 8

SCHAFFER TRANSPORTATION CO.

Docket MC–93529 Sub 2

Record of loads from Grant County, South Dakota and destination points for three trucks during year 1951

Date	Destination	No. of Stops
1- 2-51	Michigan	1
1- 6-51	Ohio	4
1- 8-51	Indiana	3
1- 9-51	Iowa, Kansas, Missouri	6
1-15-51	Ohio	1
1-20-51	Iowa	1
1-17-51	Minnesota	1
1-19-51	Indiana	5
1-20-51	Pennsylvania, Ohio	6
1-24-51	Illinois, Iowa	11
1-30-51	Ohio	6
1-30-51	Michigan, Indiana	7
1-31-51	Wisconsin	1
2- 3-51	Missouri	1
2- 6-51	Ohio	3
2- 9-51	Indiana	4
2-10-51	Michigan	4
2-16-51	New York	1
2-19-51	Illinois	2
2-20-51	New York	7
2-21-51	Indiana, Michigan	5
2-23-51	Michigan	5
3- 6-51	New York	5
3- 8-51	Indiana, Illinois	4
3-17-51	Illinois	2
3-22-51	Ohio	4
3-27-51	Illinois	1
3-30-51	Kansas	1
4- 3-51	New York	7
4- 5-51	Pennsylvania	3
4- 5-51	Ohio	3
4-11-51	Kansas	11

Date	Destination	No. of Stops
4-20-51	Michigan, Ohio	5
4-25-51	Kansas	1
4-28-51	Iowa, Nebraska	10
4-30-51	Illinois	3
5- 1-51	Wisconsin, Michigan	2
5- 4-51	Nebraska, Colorado	3
5- 5-51	Iowa, Kansas, Oklahoma	9
5- 7-51	Ohio	1
5- 9-51	New York, Illinois	10
5-14-51	Indiana, Ohio	13
5-16-51	Illinois, Iowa, Wisconsin	4
5-22-51	New York, Wis., Ohio	17
6- 2-51	Indiana, Michigan	5
6-12-51	Kansas, Nebraska, Oklahoma	9
6-16-51	New York	2
6-20-51	Illinois	1
6-25-51	Michigan, Indiana	13
6-29-51	Illinois	13
7- 5-51	Ohio	2
7- 6-51	Iowa, Nebraska, Kansas, Okla.	8
7-10-51	Ohio	6
7-13-51	Michigan	8
7-16-51	Indiana, Illinois	20
7-24-51	Michigan	11
7-25-51	Illinois	1
7-25-51	New York	11
[fol. 410]		
8- 2-51	Ohio, Indiana	11
8-30-51	Illinois	1
9-12-51	Kansas	1
9-27-51	Colorado, Kansas	4
10-10-51	Missouri	3
10-15-51	Missouri, Iowa, Illinois	7

[fol. 411] APPLICANT'S EXHIBIT No. 9

Summary of Freight Bills Covering Shipments
From Barre, Vermont
To
S. C. Stevenson Monument Works
Moberly, Missouri

Car No.	Date Shipped	Date Delivered	Weight	No. of Days
FGEX 59729	12-19-50	1- 2-51	775	17
PFE 44539	2-16-51	3- 6-51	510	18
11872 IC	5-26-51	6- 6-51	1020	11
ART 19154	5-31-51	6-11-51	600	11
166380	6-30-51	7-12-51	1900	12
63883 ATSF	7-14-51	7-25-51	880	11
48684 Wab	7-17-51	7-26-51	300	9
W 74055	8- 3-51	8-17-51	900	14
SSW 32106	8- 5-51	8-21-51	2350	16
53714	8-17-51	8-29-51	1425	12
Milw 20742	8-31-51	9-13-51	600	13
91413M	9-10-51	9-20-51	1950	10
5121	9-24-51	10- 2-51	920	9
CBQ-29128	10-10-51	10-18-51	1360	8
CBQ-47208	11- 3-51	11-12-51	910	9
W 47200	11-28-51	12- 4-51	345	7
47509	12- 8-51	12-17-51	360	9

[fol. 412] INTERVENOR'S EXHIBIT No. 10

C-15.1

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 95876 SUB 3

WM. M. DINGMANN,
DOING BUSINESS AS GRANITE CITY TRANSFER,
ST. CLOUD, MINNESOTA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 20th day of February, A. D., 1951

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions

of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Finished monumental and structual or partially finished granite, over irregular routes,

From points and places in Stearns County, Minn., and Grant County, S. Dak., to points and places in New York east of New York Highway 96, those in Pennsylvania east of U. S. Highway 15, and points and places in New Jersey, Delaware New Hampshire, Haryland, Vermont, Kentucky, Missouri, Kansas, Oklahoma, District of Columbia, Connecticut, Massachusetts, and Rhode Island.

Machinery, equipment, materials, and *supplies* used in, or in connection with, the quarrying, fabricating, and finishing of monumental and structual granite, over irregular routes,

From points and places in the above-specified destination territory (except those in Kentucky, Missouri, Kansas and Oklahoma), to points and places in Stearns County, Minn., and Grant County, S. Dak.

Return with no transportation for compensation except as otherwise authorized.

Authority is granted to traverse Ohio for operating convenience only.

[fol. 413] AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, Division 5.

W. P. BARTEL,
Secretary.

(SEAL)

[fol. 414] INTERVENOR'S EXHIBIT No. 11

C-10.1

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

No. MC 95876*

WM. M. DINGMANN,
DOING BUSINESS AS GRANITE CITY TRANSFER,
ST. CLOUD, MINNESOTA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 6th day of December, A. D., 1951

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Rough and manufactured granite,

Between points in Stearns, Wright, and Isanti Counties, Minn., Grant County, S. Dak., and Ashland County, Wis., on the one hand, and, on the other, points in Minnesota, Wisconsin (except Marathon County), Iowa, Illinois, Nebraska, and South Dakota, Indiana, Michigan, Ohio, that portion of Pennsylvania on and west of U. S. Highway 15, and that portion of New York on and west of New York Highway 96.

Supplies for quarrying and fabricating granite,

From Duluth, Minn., and points in Wisconsin (except Marathon County), Iowa, Illinois, South Dakota and Nebraska, to points in Stearns, Wright, Isanti, Renville, Redwood, Big Stone, Morrison, Benton, Lac Qui Parle, Saint Louis, Mille Lacs, and Kanabec Counties, Minn., those in Grant County, S. Dak., and those in Ashland County, Wis., except as otherwise authorized herein.

Machinery used in fabricating granite,

Between points in Minnesota, Nebraska, Iowa, Illinois and South Dakota; and between Ashland County, Wis., on the one hand, and, on the other, points in Wisconsin (except Marathon County), Minnesota, Nebraska, Iowa, Illinois, and South Dakota.

Stone,

Between Bedford, Ind., and points within 25 miles of Bedford, on the one hand, and, on the other, points in Minnesota on and north of U. S. Highway 12.

Supplies for quarrying and fabricating granite, and stone and machinery used in fabricating granite and stone in minimum shipments of 10,000 pounds,

From points in Indiana, Michigan, Ohio, that portion of Pennsylvania on and west of U. S. Highway

15, and that portion of New York on and west of New York Highway 96, to points in Stearns, Wright, Isanti, Renville, Redwood, Big Stone, Morrison, Benton, Lac Qui Parle, Saint Louis, Mille Lacs, and Kanabec Counties, Minn., those in Grant County, S. Dak., and those in Ashland County, Wis.

Any restatement of the authority granted herein shall not be construed as conferring more than one operating right.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

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*This certificate covers the remaining portions of the authority granted in the certificates issued to the above-named carrier in this proceeding and MC 95876 Sub 2, on February 4, 1943 and June 30, 1944, respectively, (as amended in MC 95876 and in MC-FC 53075), after the transfer of portions of said certificates to Oscar C. Radke, doing business as Radke Transit, pursuant to MC-FC 53075, as corrected.

[fol. 415] INTERVENOR'S EXHIBIT No. 12

(See Opposite) ☞

Washington
Oregon
California
Idaho
Nevada
Montana
Wyoming
Utah
Arizona
Colorado
New Mexico
North Dakota
South Dakota
Nebraska
Kansas
Oklahoma
Texas
Minnesota
Iowa
Missouri
Arkansas
Louisiana
Wisconsin
Mich.
Michigan
Illinois
Indiana
Ohio
Kentucky
Tennessee
Mississippi
Alabama
Georgia
Florida
S. Carolina
N.Carolina
Virginia
W.Va.
Pennsylvania
New York
Maine
N.H.
Mass
Conn.
R.I.
N.J.
Md
D.C.
Del.
This exhibit rejected Page 209. Transcript
GRANITE CITY TRANSFER AUTHORITY OPERATED FROM VERMONT. IN SO FAR AS IS AFFECTED BY THIS Application

[fol. 416] INTERVENOR'S EXHIBIT No. 13

(See Opposite) ☞

Washington
Oregon
California
Nevada
Idaho
Montana
Wyoming
Utah
Arizona
Colorado
New Mexico
North Dakota
South Dakota
Nebraska
Kansas
Oklahoma
Texas
Minnesota
Iowa
Missouri
Arkansas
Louisiana
Wisconsin
Mich.
Michigan
Illinois
Indiana
Ohio
Kentucky
Tennessee
Mississippi
Alabama
Georgia
Florida
S. Carolina
N.Carolina
Virginia
W.Va.
Pennsylvania
New York
N.J.
Del.
Md.
D.C.
Vt.
N.H.
Mass.
Conn.
R.I.
Maine

GRANITE CITY TRANSFER AUTHORITY OPERATED FROM GRANT CO. S.D. IN SO FAR AS IS AFFECTED BY THIS APPLICATION.

[fol. 417] INTERVENOR'S EXHIBIT No. 14

(See Opposite) ☞

Note

Pages 317 and 319 are on Card 6.

[fol. 418] INTERVENOR'S EXHIBIT No. 15

(See Opposite) ☞

Note

Pages 317 and 319 are on Card 6.

[fol. 419] INTERVENOR'S EXHIBIT No. 16

(See Opposite) ☞

SOUTHERN PACIFIC TRANSPORT CO.

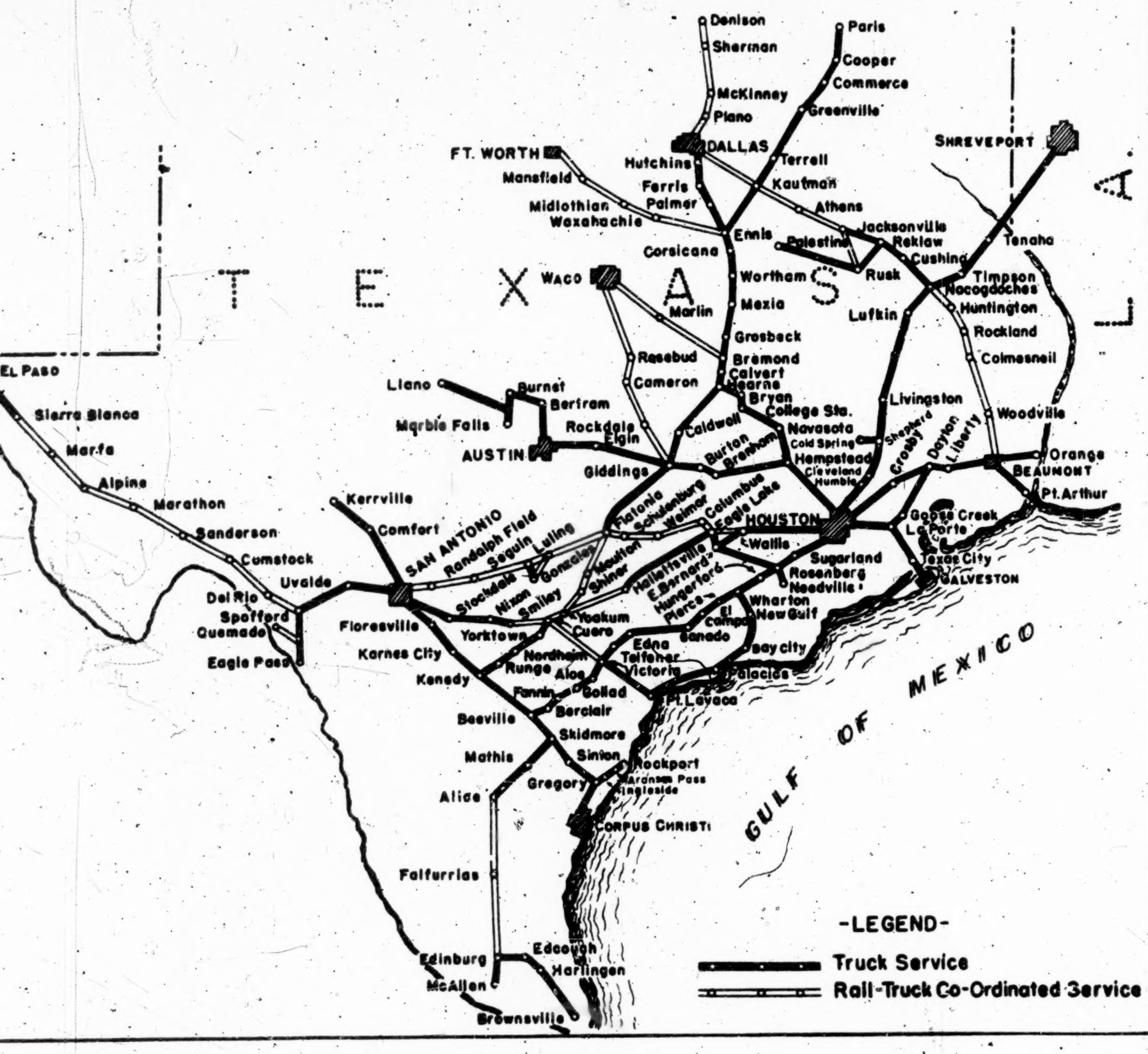
COMPLETE DEPENDABLE

FAST

TRUCK SERVICE RAIL SERVICE

ALSO TRAIN AND TRUCK CO-ORDINATED SERVICE

WE OPERATE MORE SCHEDULES TO MORE CITIES AND TOWNS IN TEXAS THAN ANY OTHER FREIGHT TRANSPORTATION AGENCY



[fol. 420]

INTERVENOR'S EXHIBIT NO. 17

TEXAS AND NEW ORLEANS RAILROAD COMPANY

REPORT SHOWING MILEAGES, STATIONS AND AGENCIES OF THE T&NO RAILROAD IN TEXAS AS OF APRIL 1, 1952

MAIN LINE MILEAGE	1810.83
BRANCH LINE MILEAGE	1800.50
TOTAL MILEAGE	3611.33
TOTAL NUMBER OF STATIONS	906
TOTAL NUMBER OF AGENCIES	242

[fol. 421]

INTERVENOR'S EXHIBIT NO. 18

TEXAS AND NEW ORLEANS RAILROAD COMPANY

REPORT SHOWING MILEAGES, STATIONS AND AGENCIES OF THE T&NO RAILROAD IN LOUISIANA AS OF APRIL 1, 1952

MAIN LINE MILEAGE	249.67
BRANCH LINE MILEAGE	431.71
TOTAL MILEAGE	681.38
TOTAL NUMBER OF STATIONS	297
TOTAL NUMBER OF AGENCIES	69

[fol. 422]

INTERVENOR'S EXHIBIT NO. 19

TEXAS AND NEW ORLEANS RAILROAD COMPANY

REPORT SHOWING NUMBER, TYPE AND TRACTIVE EFFORT OF LOCOMOTIVES IN FREIGHT SERVICE OWNED BY TEXAS AND NEW ORLEANS RAILROAD AS OF DECEMBER 31, 1945 & MAY 31, 1952

Type	Service	Locomotives		Average Tractive Effort	
		1945	1952	1945	1952
STEAM					
0-6-0	Switch	88	32	29,000	30,581
0-8-0	"	12	12	55,920	55,920
4-4-0	Road	20	3	19,395	19,873
4-4-2	"	5	0	26,080	—
4-6-0	"	21	12	30,187	35,060
4-6-2	"	37	31	39,809	40,253
2-6-0	"	82	50	32,345	32,491
2-8-0	"	73	33	41,667	40,233
2-8-2	"	57	55	53,630	53,630
2-10-2	"	61	92	67,883	70,225
4-8-4	"	11	11	62,200	62,200
DIESEL	Switch	11	80	56,373	58,454
"	Road	0	12	—	82,342
"	"	0	96	—	57,832
TOTAL		478	519	42,874	53,258

ON ORDER FOR 1953 DELIVERY

			Avg. Tractive Effort
DIESEL	Switch	20	56,373
"	Road	20	82,342
"	"	20	57,832

NEW MEXICO

ARK.

LOUISIANA

TEXAS

MEXICO

GULF OF MEXICO

RIO GRANDE RIVER

From To	CORSICANA via. Giddings	DALLAS via. Giddings
EL PASO	886.5	943.7

STATEMENT of MILEAGE

From To	DALLAS via. Beaumont	DALLAS via. Houston	FT. WORTH via. Beaumont	FT. WORTH via. Houston	HOUSTON	SAN ANTONIO	EL PASO
NEW ORLEANS	573.3	631.1	651.5	652.7	367.1	572.4	1182.3

From To	SHREVEPORT	GALVESTON	CORPUS CHRISTI	BROWNSVILLE	DALLAS	FT. WORTH	SHERMAN
HOUSTON	232.2	96.4	240.4	401.1	264.0	285.6	328.0

LEGEND

Texas & New Orleans — T. & N. O.
Southern Pacific — S. P.
Gulf Colorado & Santa Fe — G. C. & S. F.
Panhandle & Santa Fe — P. & S. F.
Atchison Topeka & Santa Fe — A. T. & S. F.
Missouri Pacific Lines — M. P.
Missouri-Kansas-Texas — M. K. & T.
Illinois Central — I. C.
Chicago Rock Island — C. R. I.
Burlington System — C. B. & Q.
Kansas City Southern — K. C. S.
Texas & Pacific — T. & P.
Louisiana & Arkansas — L. & A.
St. Louis Southwestern — S. L.-S. W.
Texas Mexican Ry — T. M.

Above mileage taken from Louisiana Table 13-L, I.C.C. 755 and Texas Table 9-L, I.C.C. 712.

SOUTHERN PACIFIC LINES
IN TEXAS & LOUISIANA
T. & N. O. R. R.

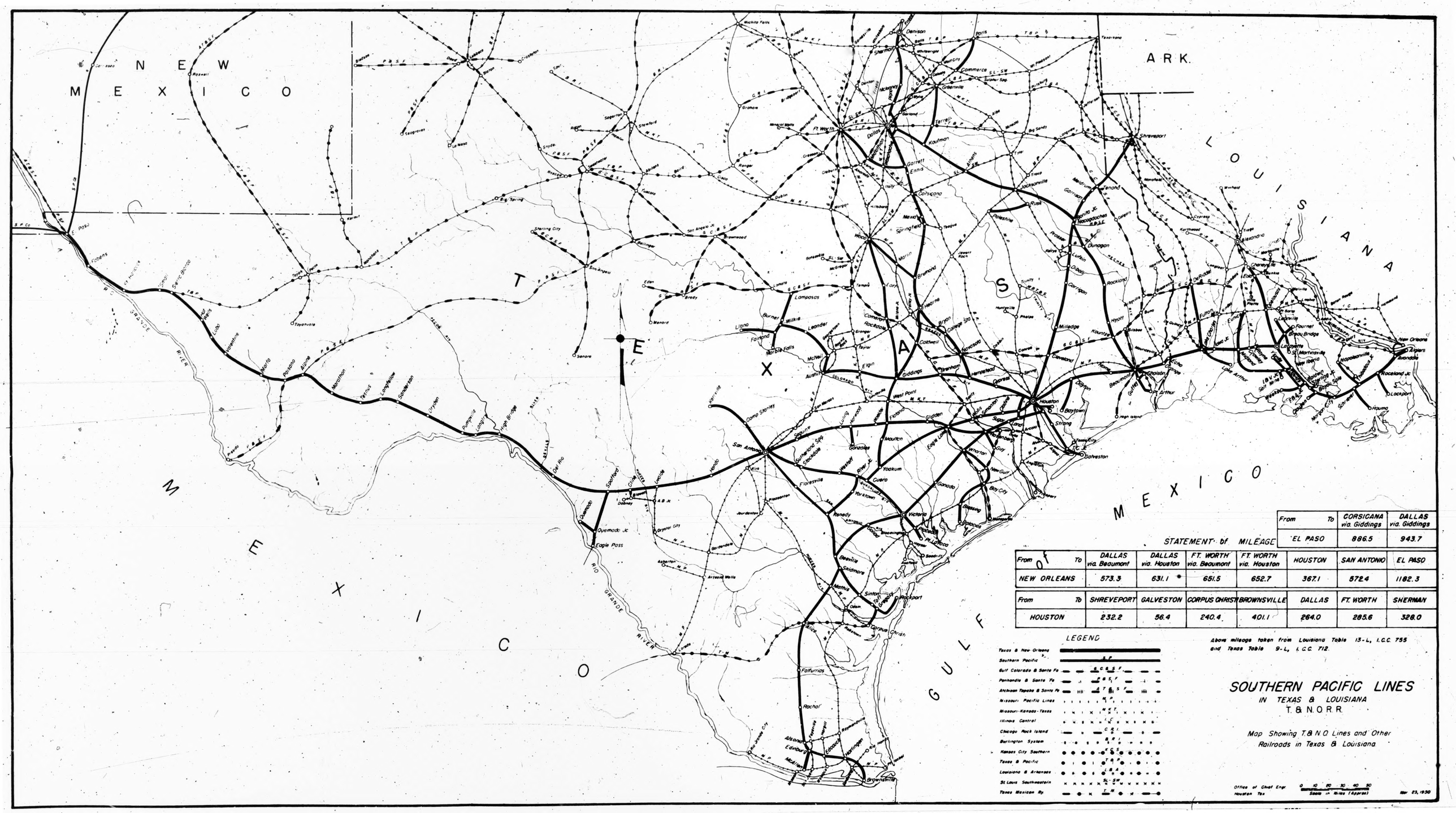
Map Showing T. & N. O. Lines and Other Railroads in Texas & Louisiana

Office of Chief Engr. Houston Tex.

Scale in Miles (Approx.) 0 10 20 30 40 50

Mar 23, 1950

Dwg 81001 C-13 T-60



STATEMENT of MILEAGE

From To	CORSICANA via. Giddings	DALLAS via. Giddings
EL PASO	886.5	943.7

From To	DALLAS via. Beaumont	DALLAS via. Houston	FT. WORTH via. Beaumont	FT. WORTH via. Houston	HOUSTON	SAN ANTONIO	EL PASO
NEW ORLEANS	573.3	631.1	651.5	652.7	367.1	572.4	1182.3

From To	SHREVEPORT	GALVESTON	CORPUS CHRISTI	BROWNSVILLE	DALLAS	FT. WORTH	SHERMAN
HOUSTON	232.2	56.4	240.4	401.1	264.0	285.6	328.0

LEGEND

Texas & New Orleans
Southern Pacific
Gulf Colorado & Santa Fe
Panhandle & Santa Fe
Atchison Topeka & Santa Fe
Missouri Pacific Lines
Missouri-Kansas-Texas
Illinois Central
Chicago Rock Island
Burlington System
Kansas City Southern
Texas & Pacific
Louisiana & Arkansas
St. Louis Southwestern
Texas Mexican Ry.

Above mileage taken from Louisiana Table 13-L, I.C.C. 755 and Texas Table 9-L, I.C.C. 712.

SOUTHERN PACIFIC LINES
IN TEXAS & LOUISIANA
T. & N. O. R. R.

Map Showing T. & N. O. Lines and Other Railroads in Texas & Louisiana

Office of Chief Engr. Houston Tex.

Scale in Miles (Approx.) 0 10 20 30 40 50

Mar. 23, 1950

[fol. 423]

INTERVENOR'S EXHIBIT No. 20

TEXAS AND NEW ORLEANS RAILROAD COMPANY

STATEMENT SHOWING NUMBER FREIGHT CARS AND AGGREGATE CAPACITY OWNED BY T&NO RAILROAD AS OF DEC. 1, 1944 AND APRIL 1, 1952

	Dec. 1944		April 1952	
Type of Car	No. of Units	Aggregate Capacity Tons	No. of Units	Aggregate Capacity Tons
Box Cars	5,438	264,270	7,936	394,570
Flat Cars	1,079	51,060	538	28,640
Stock Cars	1,880	75,200	634	25,360
Gondola and Hopper	1,787	93,180	4,866	259,780
Other	1,564	65,930	732	31,290
TOTALS	11,748	549,640	14,706	739,640

ON ORDER FOR 1952 DELIVERY

Box	1,000

[fol. 424] APPLICANT'S EXHIBIT No. 21

(Received in evidence as Applicant's Late Filed Exhibit #21. See T. p. 15, No. MC-93529 (S. R. H. Roberts 9-9-52.)

A. W. Schaffer
Operating Statement 1951

Garage

INCOME		
Gas & Oil	$10,341.70	
Parts	9,407.54	
Tires	11,972.73	
Insurance	2,500.00	$34,221.97
EXPENSES:		
Gas & Oil	$10,341.70	
Parts	9,202.20	
Tires	11,972.73	
Power	211.92	
Heat	205.05	
Rent	430.00	
Labor	5,001.13	
Social Security & Employment Security	175.05	
Insurance	40.13	
Bad Debts charged Off	512.57	
Workmen's Compensation Insurance	101.50	
Office Expense	368.00	$38,561.98
NET LOSS		$ 4,340.01

[fol. 425] APPLICANT'S EXHIBIT No. 22

JONES BROS.

LIST OF DEALERS

WISCONSIN:

Appleton Marble & Granite Works, Appleton, Wisc.
Benzing Mont. Co., Milwaukee, Wisc.
Bittman Mont. Co., Milwaukee, Wisc.
Johnson Mont. Co., Chippewa Falls, Wisc.
Kannenburg Mont. Co., Schofield, Wisc.
Carl Manthey & Son, Green Bay, Wisc.
North State Granite Works, Rhinelander, Wisc.
Schumacher Mont. Works, Pt. Washington, Wisc.
G. Reinke & Co., Oshkosh, Wisc.
Vach-Werner Mont. Co., Lacrosse, Wisc.
M. C. Mingesz & Son, Milwaukee, Wisc.
Zimmerman Memorial, Milwaukee, Wisc.

OKLAHOMA:

F. E. Arnold Mont. Co., El Reno, Okla.
Gifford Mont. Co., Muskogee, Okla.
Hahn Bros., Blackwell, Okla.
Bradford Mont. Co., Tulsa, Okla.
McAlester Mont. Co., McAlester, Okla.
Nelson Mont. Co., Enid, Okla.
Oklahoma City Marble & Granite Co., Okla. City, Okla.
Southwestern Marble & Granite Co., Okla. City, Okla.
Vernon C. Torrance, Ardmore, Okla.
Tulsa Mont. Co., Tulsa, Okla.

ILLINOIS:

Art Stone Co., Rock Island, Ill.
S. P. Atkinson Mont. Co., Champaign, Ill.
C. N. Clark & Co., Urbana, Ill.,
DeKalb Mont. Works, DeKalb, Ill.,
W. H. Grindol & Sons, Decatur, Ill.,
F. N. King & Son, Sandwich, Ill.,
Lincoln Mont. Co., Lincoln, Ill.,
McFall Mont. Co., Galesburg, Ill.,
John Merkle & Sons, Peoria, Ill.,

ILLINOIS (Cont'd)

Robt. Trigg & Sons, Rockford, Ill.,
Venetian Mont. Co., Chicago, Ill.,
Aurora Mont. Co., Aurora, Ill.,
S. Berliner Mont. Co., Forest Park, Ill.,
Bertacchi & Sons, Hillside, Ill.,
Charles G. Blake & Co., Chicago, Ill.,
Collins & Loomis, Libertyville, Ill.,
Eigel Mont. Co., Chicago, Ill.,
Gall & Co., Chicago, Ill.,
Arthur T. Haertel, Chicago, Ill.,
Hertzfield Mont. Co., Forest Park, Ill.,
Illinois Mont. Co., Chicago, Ill.,
Krumsick Memorial Co., Taylorville, Ill.,
Macomb Mont. Co., Macomb, Ill.,
[fol. 426] Meir Granite Co., Chicago, Ill.,
Mendota Mont. Co., Mendota, Ill.,
Pechar & Sons, Chicago, Ill.,
Otto Reich Mont. Co., Forest Park, Ill.,
Roselli Bros. Co., Hillside, Ill.,
St. Casimir Mont. Co., Chicago, Ill.,
Peter Troost Mont. Co., Hillside, Ill.,
E. Wunderlich Gr. Co., Joliet, Ill.,

IOWA:

C. O. Barr, Webster City, Ia.
Boyce Mont. & Wilbert Vault Co., Clinton, Ia.
Esterville Memorial Co., Estherville, Ia.
Sheeley & Lane, Council Bluffs, Ia.
Waterloo Memorial Co., Waterloo, Ia.
L. V. Case Mont., Pleasant, Ia.
W. H. Godden, Algona, Ia.,
Iglehart Mont. Co., Davenport, Ia,
Leyda-Burrus & Metz, Burlington, Ia.
Phillips & Gauld, Des Moines, Ia.
Sloan Mont. Works, Sigourney, Ia.
Whitney Mont. Works, Fairfield, Ia.

MONTANA:

Billings Mont. Co., Billings, Mont.
Butte Tombstone Co., Butte, Mont.

MONTANA (Cont'd)

Great Falls Mont. & Vault Co., Great Falls, Mont.
Kain Granite Co., Helena, Mont.,
Livingston Marble & Granite Co., Bozeman, Mont.
Trevillion-Johnson Memorials, Butte, Mont.

MINNESOTA:

Lee M. Bogle Co., Minneapolis, Minn.
Crookston Granite Co., Crookston, Minn.
Detroit Lakes Granite Works, Detroit Lakes, Minn.
Eckes Mont. Co., St. Paul, Minn.
Osborne-Peterson Inc., St. Paul, Minn.
Thrana Memorials, Inc., Duluth, Minn.
Westlund Mont. Co., Minneapolis, Minn.

TEXAS:

Chas. W. Stolz & Co., Victoria, Texas
Memorial Arts, Inc., Houston, Texas
Rodriguez Bros., San Antonio, Texas
Fort Worth Mont. Wks., Fort Worth, Texas
Youngblood Memorial Co., Greenville, Texas

MISSOURI:

Central Missouri Mont. Co., Marshall, Mo.,
Chas. A. Dunkelberg, Fulton, Mo.
England Memorial Works, Neosho, Mo.,
Holden Mont. Works, Holden, Mo.,
[fol. 427] Joplin Granite Co., Joplin, Mo.
Kansas City Mont. Co., Kansas City, Mo.,
Kent-Clark, Springfield, Mo.
John H. McCarty Mont. Co., St. Louis, Mo.
Thomas Orr, Richmond, Mo.
Pickel Stone Co., St. Louis, Mo.
Pohl & King, St. Louis, Mo.
Rosenbloom Mont. Co., St. Louis, Mo.
A. W. Sandring, Lexington, Mo.
Winton Mont. Works, Poplar Bluff, Mo.

COLORADO:

Colorado Survault Co., Grand Junction, Colo.
Evergreen Memorial Co., Colorado Springs, Colo.

COLORADO (Cont'd)

Fort Collins Mont. Co., Fort Collins, Colo.
G. & L. Granite Co., Denver, Colo.
Greeley Mont. Works, Greeley, Colo.
Jacques Bros., Denver, Colo.
Marvin Memorials, Pueblo, Colo.
Draper P. Smith, Longmont, Colo.
Watson Memorial Co., Denver, Colo.

NO. DAKOTA:

Wahpeton Mont. Wks., Wahpeton, No. Dakota
Dakota Mont. Co., Fargo, No. Dakota.

SO. DAKOTA:

W. N. Rapalee, Yankton, So. Dakota.

LOUISIANA:

Louisiana Mont. Co., Shreveport, La.

ARKANSAS:

John C. McHaney & Son, Blytheville, Ark.
Putman Funeral Home, Ft. Smith, Ark.,
Wilkerson Mont. Co., DeQueen, Ark.

NEBRASKA:

E. W. Schmidt & Son, Blair, Nebraska
Paine Mont. Co., Grand Island, Neb.
Potthast Mont. Co., Norfolk, Nebr.,
Svoboda Mont. Co., Omaha, Neb.

WYOMING: None

[fol. 428] APPLICANT'S EXHIBIT NO. 23

JONES BROS.

POOL CAR SHIPMENT RECORD SHOWING ELAPSED TIME BETWEEN FINISHING WORK AND SHIPPING DATE.

LEE M. BOGLE CO., MINNEAPOLIS, MINN.

1534–62533 FINISHED 3/22/51
SHIPPED 5/11/51

1534–66451 FINISHED 1/29/52
SHIPPED 4/5/52

1534–66452 FINISHED 2/13/52
SHIPPED 4/5/52

THRANA MEMORIALS, DULUTH, MINN.

126–65189 FINISHED 1/14/52
SHIPPED 4/5/52

128–65190 FINISHED 1/15/52
SHIPPED 4/5/52

128–62522 FINISHED 6/13/51
SHIPPED 8/22/51

WESTLUND MONT. CO., MINNEAPOLIS, MINN.

307–66674 FINISHED 1/10/52
SHIPPED 4/5/52

DAKOTA MONT. CO., FARGO, NO. DAKOTA

518–65774 FINISHED 12/21/51
SHIPPED 4/9/52

GIFFORD MONT. CO., MUSKOGEE, OKLA.

1621–63816 FINISHED 6/11/51
SHIPPED 9/22/51

OKLAHOMA CITY MARBLE & GRANITE CO., OKLA. CITY, OKLA

1050–63476 FINISHED 4/10/51
SHIPPED 9/22/51

1050–61521 FINISHED 10/27/50
SHIPPED 1/8/51

GREAT FALLS, MONT. & VAULT CO., GREAT FALLS, MONT.

804–66727 FINISHED 1/28/52
SHIPPED 4/2/52
804–65798 FINISHED 11/5/51
SHIPPED 4/2/52

[fol. 429] KAIN GRANITE CO., HELENA, MONT.

343–65818 FINISHED 12/12/51
SHIPPED 4/2/52
343–65816 FINISHED 12/5/51
SHIPPED 4/2/52
343–65815 FINISHED 11/26/51
SHIPPED 4/2/52

GREELEY MONT. WORKS, GREELEY, COLORADO

1662–66070 FINISHED 12/10/51
SHIPPED 4/17/52
1662–66069 FINISHED 1/11/52
SHIPPED 4/17/52

LEYDA-BURRUS & METZ, BURLINGTON, IOWA

1088–61506 FINISHED 4/13/51
SHIPPED 8/2/51

WHITNEY MONT. WORKS, FAIRFIELD, IOWA

170–66152 FINISHED 11/21/51
SHIPPED 3/27/52
170–66151 FINISHED 2/22/52
SHIPPED 3/27/52

PAINE MONT. CO., GRAND ISLAND, NEBRASKA.

309–62086 FINISHED 12/7/50
SHIPPED 4/21/51
309–62085 FINISHED 12/1/50
SHIPPED 4/21/51

E. W. SCHMIDT & SON, BLAIR, NEBRASKA

94–66135 FINISHED 1/16/52
SHIPPED 3/25/52
94–66136 FINISHED 2/6/52
SHIPPED 3/25/52

Rodriguez Bros., San Antonio, Texas
502–63289 Finished 2/7/51
Shipped 8/9/51
502–63288 Finished 7/12/51
Shipped 8/9/51

Youngblood Memorial Co., Greenville, Texas
1515–63291 Finished 5/28/51
Shipped 8/30/51
1515–63290 Finished 2/28/51
Shipped 8/30/51

Wilkerson Mont. Co., De Queen, Arkansas
1603–62588 Finished 3/1/51
Shipped 5/17/51

[fol. 430] Applicant's Exhibit No. 24

ROCK OF AGES

Dealer List

States.	C/L Dlrs.	L.C.L. Dlrs.	Weight of Shipments 3 yr. Ave. '49, '50, '51.
South Dakota	2	2	224,000
North Dakota		1	16,000
Wyoming		4	41,600
Wisconsin	1	16	244,000
Missouri	4	16	589,600
Nebraska	2	7	236,000
Arkansas	3	4	173,600
Louisiana	3	4	108,000
Minnesota	1	7	127,000
Montana		8	74,400
Colorado	1	3	63,200
Illinois	6	41	1,312,000
Iowa	6	15	672,000
Oklahoma	4	11	212,000
Texas	8	21	720,000
Kansas	4	8	465,184
Total	45	168	5,278,584

[fol. 431]

	Carload Dealers	*L.C.L. Dealers*
ILLINOIS:	Pontiac Granite Co., Pontiac, Ill.,	Boese & Son, Hillside, Ill.
	Westville Mt. Co., Westville, Ill.,	C. Cilella & Son Chicago, Ill.,
	Thurmond Mt. Co., Marion, Ill.,	Eifel Mt. Co., Chicago, Ill.,
	Pioneer Mem. Wks., Chicago, Ill.,	Elgin Granite Wks. Elgin, Ill.,
	E. Wunderlich Gr. Co. Joliet, Ill.,	Gall & Co., Chicago, Ill.,
	Bertacchi & Co., Hillside, Ill.,	Gaynor Mt. Co., Evanston, Ill.,
		Goldman Alves Mts. Chicago, Ill.,
		Hackett & Son Chicago, Ill.,
		Arthur T. Haertel Chicago, Ill.,
		Hoefner Bros., Elmhurst, Ill.
		Namin Monu. Wks. Chicago, Ill.,
		Katz-Goldman Memorials Norridge, Ill.,
		F. N. King & Son Sandwich, Ill.,
		A. W. Kistenbroker Forest Park, Ill.,
		A. F. Lohmann Aurora, Ill.,
		Meier Granite Co., Chicago, Ill.,
		Mendota Mt. Co., Mendota, Ill.,
		Midwest M. & G. Hillside, Ill.,

ILLINOIS (Cont'd)	*Carload Dealers*	*L.C.L. Dealers*
		Maurice Moore Worth, Ill.,
		M. Moore, Chicago, Ill.,
[fol. 432]		Mt. Olive Mt. Works Chicago, Ill.,
		A. O. Novander Chicago, Ill.,
		Pechar & Son Chicago, Ill.,
		C. J. O'Neil Hillside, Illinois
		Otto Reich Mt. Co., Forest Park, Ill.,
		St. Casimir Mt. Co., Chicago, Ill.,
		St. Mary's & Evergreen Evergreen Park, Ill.,
		W. M. Thomas Mt. Co., Ottawa, Ill.,
		Zoia Monument Works Woodstock, Illinois
		Robert Trigg & Sons Rockford, Illinois
		T. A. Wachtel & Son Mt. Carroll, Illinois
		Triebel & Sons Peoria, Illinois
		McFall Monument Co., Galesburg, Illinois
		S. P. Atkinson Mt. Co., Champaign, Illinois
		Westville Mt. Works Westville, Illinois

ILLINOIS (Cont'd)	*Carload Dealers*	*L.C.L. Dealers*
		Krumsiek Memorials Taylorville, Illinois
		Clark Memorial Shop Newton, Illinois
		Sanders Mem. Works Centralia, Illinois
		Decatur Monument Co. Decatur, Illinois
		Stewart Memorials, Mattoon, Ill.,
[fol. 433]		
IOWA:	Holden Mt. Company Cherokee, Iowa	Carroll M. & G. Wks. Carroll, Iowa
	Kallin-Peterson Mt. Co., Fort Dodge, Iowa	Harlan Monument Works Harlan, Iowa
	Decorah Granite Wks. Decorah, Iowa	Perry Granite Works Perry, Ia.
	Iowa Memorial Co., West Liberty, Ia.	Beringer Mt. Works Hampton, Iowa
	Hall Monument Co. Sioux City, Ia.	Charles City Gr. Wks. Charles City, Iowa
	Des Moines Monuments Des Moines, Iowa	Matt Gruben & Sons Waverly, Iowa
		Grinnell Monument Co., Grinnell, Iowa
		Winterset Mt. Co., Winterset, Ia.
		Dunn Monument Works Chariton, Iowa
		Ottumwa Granite Works Ottumwa, Iowa
		Leyda, Burrus & Metz Burlington, Iowa
		L. V. Case Memorials Mt. Pleasant, Iowa

Iowa (Cont'd)	*Carload Dealers*	*L.C.L. Dealers*
		Monticello Mt. Co., Monticello, Iowa
		Kroese Mt. Company Red Oak, Iowa
		Shricker Mt. Co., Davenport, Iowa
[fol. 434]		
South Dakota:	A. L. Green Mt. Wks. Sioux Falls, S. Dak.	Deadwood Granite Wks. Deadwood, S. D.,
	Huron M. & Gr. Wks. Huron, So. Dak.	Aberdeen Mt. Co. Aberdeen, S. D.
North Dakota:		Jack Monument Co. Minot, N. D.
Wyoming:		Casper Monument Co. Casper, Wyo.
		Wyoming Monument Co. Cheyenne, Wyo.
		Big Horn Granite Wks. Sheridan, Wyo.
		Bib Horn Granite Wks., Basin, Wyo.
Wisconsin:	Dodgeville Mt. Co., Dodgeville, Wisc.	P. H. Hamerly & Son Menomonie, Wisc.
		Johnson Mt. Co. Chippewa Falls, Wisc.
		Johnson Mt. Co. Eau Claire, Wisc.
		Wausau Mt. Wks. Wausau, Wisc.
		Van Gemert Memorials West de Pere, Wisc.
		G. Reinke & Co., Oshkosh, Wisc.
		Vach-Werner Mt. Co. LaCrosse, Wisc.
		S. A. Collins Mt. Co., Reedsburg, Wisc.

	Carload Orders	*L.C.L. Dealers*
WISCONSIN (Cont'd)		Beaver Dam Monument Co. Beaver Dam, Wisc.
		P. L. Gehl & Co., Hartford, Wisc.
		Architectural Cy? Co., Milwaukee, Wisc.
		Shaefer & Co., Milwaukee, Wisc.
		Robt. J. Schmidt Memorials Milwaukee, Wisc.
[fol. 435]		Grindell Gr. Wks. Platteville, Wisc.
		Gramke Mt. Works Janesville, Wisc.
		Jackson Mt. Corp. Beloit, Wisc.
MISSOURI:	Kansas City Mt. Company Kansas City, Mo.	Sloan Monument Works Cameron, Missouri
	Clinton L. Allen Maryville, Mo.	Moore Monument Co. Chillicothe, Mo.
	Stanze Mt. Co. St. Louis, Mo.	Redwell Granite Works Shelbina, Mo.
	Breen-Thomas Mt. Co. St. Louis, Mo.	McMein Mt. Company Hannibal, Mo.
		Walker Audlsey Glasgow, Mo.,
		Chas. A. Dunkelberg Fulton, Mo.
		Heynen Mt. Co. Sedalia, Mo.
		Frank Waye St. Charles, Mo.
		Washington Mt. Co. Washington, Mo.

	Carload Dealers	L.C.L. Dealers
Missouri (Cont'd)		Shea-Morris Mt. Co., Springfield, Mo.
		Reeder Memorials Lexington, Mo.
		Winton Monument Works Poplar Bluff, Mo.
		Pohl & King Mt. Co., St. Louis, Mo.
		Bastel Art Memorial Co. St. Louis, Mo.
		Festus-Crystal Mt. Co. Festus, Missouri
		Modern Mt. Works Rolla, Missouri
{fol. 436]		
Nebraska	Palmer Bros. Mt. Co. Holdrege, Nebraska	Herstead Mt. Company Scottsbluff, Nebraska
	C. E. Speidell & Son Lincoln, Nebraska	North Platte Mt. Co. North Platte, Nebraska
		Scheffel & Sons Grand Island, Nebraska
		Feis Memorial Works Hastings, Nebraska
		Potthast Monument Co. Norfolk, Nebraska
		Walther Monument Co. Fremont, Nebraska
		Omaha Monument Company Omaha, Nebraska.
Arkansas:	Camden Mt. Works Camden, Arkansas	Ferguson Mt. Works Morrilton, Ark.
	Gifford M. & Gr. Wks. Fort Smith, Arkansas	Norman Memorials Jonesboro, Ark.

	Carload Dealers	L.C.L. Dealers
ARKANSAS (Cont'd)	Pine Bluff Mt. Co. Pine Bluff, Ark.	Jno. C. McHaney Blytheville, Ark.
		Springdale Mt. Company Springdale, Ark.
LOUISIANA:	Allen Monument Company Shreveport, La.	Allen Mt. Co. of Monroe West Monroe, La.
	Louisiana Mt. Company Shreveport, La.	Pineville M. & G. Pineville, La.
	Acme Memorial Company New Orleans, La.	Dugas Burial Vault Co. Lafayette, La.
		Solari Mble. & Gr. Wks. Lake Charles, La.
[fol. 437]		
MINNESOTA	Lee M. Bogle Company Minneapolis, Minn.	Greene, Grignon & Peterson Duluth, Minn.
		St. Croix Mt. Works Stillwater, Minn.
		McGraw Mt. Works LeSueur, Minn.
		Lewiston Mt. Co. Lewiston, Minn.
		Blue Earth Mt. Co. Blue Earth, Minn.
		Star Granite Works Albert Lea, Minn.
		Austin Memorials Austin, Minn.
MONTANA		Garden City Gr. Co. Missoula, Montana
		Great Falls Mt. Co. Great Falls, Mont.,
		Butte Tombstone Co. Butte, Mont.

MONTANA (Cont'd)	*Carload Dealers*	*L.C.L. Dealers*
		Trevillion-Johnson Memorials Butte, Mont.
		Bozeman Monument Works Bozeman, Mont.
		Livingston M. & G. Wks., Livingston, Mont.
		Rummel Mt. Works Helena, Mont.
		Billings Monument Co. Billings, Mont.
COLORADO	Colorado Su-vault Co., Grand Junction, Colo.	Draper P. Smith Longmont, Colorado
		Sterling Monument Co. Sterling, Colo.
		Wilhelm Monument Co. Colorado Springs, Colo.

[fol. 438]

OKLAHOMA	Woodward Monument Co. Woodward, Okla.	Hahn Bros. Memorial Co. Blackwell, Okla.
	Chickasha Mt. Co. Chickasha, Okla.	Stillwater Memorial Co. Stillwater, Okla.
	Tulsa Mt. Co. Tulsa, Okla.	Guthrie Mt. Co. Guthrie, Okla.
	Acme Memorial Co. Clinton, Okla.	F. E. Arnold Mt. Co. El Reno, Okla.
		Muskogee M. & G. Wks. Muskogee, Okla.
		Shawnee Memorial Works Shawnee, Okla.
		Okla. City M. & G. Oklahoma City, Okla.

	Carload Dealers	L.C.L. Dealers
OKLAHOMA (Cont'd)		Capitol Hill Mem. Co. Oklahoma City, Okla.
		Gifford Mt'l. Works Ada, Okla.
		Lawton Monument Wks. Lawton, Okla.
		Vernon E. Torrance Ardmore, Okla.
KANSAS:	Memorial Art Co. Salina, Kansas	D.O. Sellers Mt. Wks. Paola, Kansas
	Memorial Art Co. Dodge City, Kansas	Lawrence Memorial Co. Lawrence, Kansas
	R. W. Park & Sons Wichita, Kansas	Hutton Mt. Works Topeka, Kansas
	ElDorado Mt. Co. ElDorado, Kansas	J. L. Scott Marion, Kansas
		Great Bend Mt. Co. Great Bend, Kansas
		Caton's Mem. Works Winfield, Kansas
		J. J. Norton Newton, Kansas
		Williams Mt. Works Iola, Kansas
[fol. 439]		
TEXAS	South Plains Mt. Co. Lubbock, Texas	South Plains Mt. Co. Plainview, Texas
	Reneau Memor. Service McKinney, Texas	A. G. Deatherage & Son Wichita Falls, Texas
	Grigson M. & G. Wks. Texarkana, Texas	Gainesville M. & G. Gainesville, Texas
	Rodriguez Bros. Mem'ls. San Antonio, Texas	DeWeese Monument Co. Paris, Texas

TEXAS (Cont'd)	*Carload Dealers*	*L.C.L. Dealers*
	Corpus Christi Memorials Corpus Christi, Texas	Geo. A. Bergin & Sons Sulphur Springs, Texas
	Memorial Arts, Inc. Houston, Texas	Youngblood Memorial Co. Greenville, Texas
	Memorial Arts El Paso, Texas	Monumental Arts, Inc. Dallas, Texas
	Miller Memorials Victoria, Texas	Forth Worth Mt. Co. Fort Worth, Texas
		E. C. Routh & Son Ft. Worth, Texas
		Alex. Rawlings & Son Weatherford, Texas
		Young County Mt. Co. Graham, Texas
		Hallam Memorials Wills Point, Texas
		Vance Burks Tyler, Texas
		Marshall M. & G. Wks., Marshall, Texas
		Geo. P. Partin & Son Nacogdocjes, Texas
		Gould Mt. Works Jacksonville, Texas
		Henderson Granite Co. Henderson, Texas
		Smith Monumental Works Waco, Texas
		Robinson Mt. Co. San Angelo, Texas
		Valley Memorial Co., McAllen, Texas
		Osgood Mt. Co., Amarillo, Texas

[fol. 440] INTERSTATE COMMERCE COMMISSION

Served FEB 10 1953

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 20 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 10 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC–93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Submitted ..... Decided .....

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, of

granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in 10 described States and the District of Columbia, and (2) from points in Washington and Orange Counties, Vt., to points in 16 specified States, over irregular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

Donald A. Morken and *J. L. Hetland* for applicant.

Frank M. Coyne, R. W. Cronon, James G. Lane, and *Claude G. Metzler* for protestants and interveners in opposition to the application.

REPORT AND ORDER

RECOMMENDED BY RICHARD H. ROBERTS, EXAMINER

By application filed May 28, 1951, as amended at the hearings, A. W. Schaffer, of Revillo, S. Dak., doing business [fol. 440a] as Schaffer Transportation Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite, manufactured and rough, (a) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (b) from points in Vermont, to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes. Granite City Transfer, Class I Rail Carriers in Western Trunk Line Territory, New England Territory Railroads, Texas Railroad Association, and Eastern Railroads (except the Chesapeake & Ohio Railway) oppose the application.

In accordance with the provisions of the Interstate Commerce Act, the application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on June 13, 1952, at St. Paul, Minn. Prior to the issuance of the examiner's recommended order applicant petitioned for further hearing. Good cause

appearing therefor, by order dated September 19, 1952, the matter was reopened for further hearing. Further hearing was held on December 2, 1952, at Washington, D. C.

Applicant is presently authorized, among other things, to transport granite from points in Grant County to points in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York, and to render return movements of silicon carbide, from Niagara Falls, N. Y., steel shot from Mansfield, Ohio, and polishing stucco, from Fort Dodge, Iowa and Chicago Heights, Ill., to points in Grant County, over irregular routes. He also performs certain regular route operations in Minnesota and South Dakota, in the transportation of general and special commodities. By the instant application, he seeks to extend his granite operations out of Grant County, to Montana and Wyoming points, and to points in the named southwestern and eastern States, as well as to obtain return loads of granite from Vermont origins that are destined to the 16 States involved. Applicant will have no backhaul from the Texas-Louisiana territory but intends to deadhead from extreme eastern destinations to the Barre, Vt. granite producing area to pick up traffic on westbound movements.

Applicant is also engaged in a number of profitable private enterprises separate and apart from the above-described motor common carrier operations. He operates a garage at Alby, S. Dak., is engaged in farming, and is a wholesale distributor of feed and other products for the Ca[illegible] Salt Company. He asserts that he maintains separate books on all of his operations. He operates a total of 14 units of equipment, plus a spare tractor. Nine of these units and the spare tractor are used in the for-hire transportation business, of which six are assigned exclusively to the movement of granite. Four units are used in the private operations. About 90 percent of applicant's time is devoted to his for-hire motor carrier operations. As of December 31, 1951, applicant shows total assets of $38,414, total liabilities of $16,448, leaving a net worth of $21,965. At the further hearing he admitted considerably more net profit for 1952 than for 1951. Applicant is fit and

able, financially and otherwise, properly to conduct any operations hereinafter authorized.

[fol. 441] There are three granite fabricating plants in the South Dakota area some of which have quarry and finishing plants at separate locations.

In 1951, applicant transported 157 loads of granite out of Grant County. He presently has one load a week destined to New York and Pennsylvania areas and frequently operates empty on return. Should the authority herein sought be granted he proposes to station a dispatcher and several pieces of equipment either at Barre or Montpelier, Vt., and to perform a "shuttle" service between the South Dakota and Vermont origins. He usually knows a week in advance as to any outbound movement of granite and considers he will have ample time to dispatch sufficient equipment wherever it may be needed. Applicant now offers third-day delivery from Grant County origins to points in Illinois, Indiana, and western Ohio, and fifth-day delivery to upstate New York points. He estimates that an additional day will be required to serve the proposed New England points and from five to eight days enroute to the southern and eastern destinations. Approximately the same transit time is estimated for operations westward out of Vermont in the reverse order. In the past applicant has leased his equipment to other parties for return loads but has found such arrangements unsatisfactory. He will discontinue these practices if the authority sought herein is granted.

The consignees served by applicant are primarily monument dealers whose display lots may be located in suburban or rural areas. Only three of his present granite customers are located on rail sidings. His present shipper is located at Milbank, (Grant County), S. Dak., and is several miles from existing rail facilities. Where only one stop is involved, applicant finds loading simple, but where multiple stops are involved, it becomes more difficult because the unloading is from the middle instead of the rear of a vehicle. Skids and hoists are used and sometimes foam rubber pads, on highly damageable merchandise. Granite is easily chipped and must be handled with care. In 1951, applicant had only two damage claims, totaling $150. The

volume of a load varies from a 24,000 pound minimum to a 33,000 pound maximum. A large percentage of the loads are split-deliveries. Eighty percent of the tonnage is finished granite, 10 percent semi-finished and 10 percent rough stone. South Dakota granite is reddish in color as compared to the Vermont product which is a gray granite.

Applicant believes that a grant of the authority sought herein will be favorable to his existing operations both servicewise and financially. It would improve his return-haul problems from the east by the elimination of a certain amount of empty mileage. He also claims to have lost a substantial amount of traffic because of his inability to serve the proposed eastern destinations. He alleges that no other granite motor carrier has equipment stationed in Grant County at the present time and he knows of no carrier operating a single-line service from the Barre area to the involved destination States.

The Dakota Granite Company of Milbank, is a wholesale shipper of granite to retail outlets. Grant County, where it has two quarries, contains a ledge of reddish-brown granite that is quarried and finished into mausoleums, monuments, and building granite. Shipper's products pres- [fol. 441a] ently move outbound by truck and by rail in less-carload quantities. It satisfactorily utilizes applicant's services several times a week. However, its facilities are located 6½ miles from a rail siding and it uses its own vehicle to place tonnage at the railhead. Shipper professes a need for applicant's proposed motor carrier service to all points in the 11 described States sought to be served from Grant County, claiming to have salesmen working in the New England States, Texas, Arkansas, North Dakota, Colorado, and West Virginia. It is developing an area in Texas where it cannot expect carload sales immediately and less-carload shipments are too costly for the consignee-dealer. Shipper anticipates only about 24,000 pounds of granite moving to that area a year at the start, and it desires motor carrier transportation in connection therewith. It also has about 35 customers in Connecticut and an unstated number in Massachusetts. New England rail shipments have heretofore taken too long in transit. Orders are now on file covering shipments

of granite (which customers desire truck delivery therefor) to such specific points as New Haven, New Brighton, Bristol, and Waterbury, Conn., Greenfield and Wooster, Mass., and Dallas, Lubbock, Jasper, Paris, and Waco, Tex. Also, a large amount of granite is being shipped to North Dakota for the construction of the Peace Garden near the Canadian Border. Ordinarily, shipper's customers are limited to one at each given point. It would use applicant's proposed service 7 or 8 times a year from Grant County to the New England area and would consolidate shipments destined to points in adjoining States. Shipper has not used intervener Granite City Transfer in the past two years primarily because that carrier's rates are considerably higher than applicant's. Moreover, it prefers the use of a carrier whose equipment is stationed near its place of business. It takes intervener three hours from St. Cloud, Minn., to pick up shipments after a call for service. Customers desire split shipments at a reasonable rate and with fast delivery service. Applicant's service has been fast with very little breakage. When ordinary dry freight carriers are used, shipper has found that the damage to goods is excessive. It also finds that it is more economical to load a motor common carrier vehicle at its fabricating plant with its own crane than to transport a load in its own vehicle seven miles to the railhead for further movement by rail. Furthermore, crating is unnecessary on truck shipments.

Osborne-Peterson, Inc., of St. Paul, is a retail monument dealer which fabricates and letters monuments and markers. Inbound, it receives both rough and finished granite and desires to obtain its Vermont granite faster and in better condition than it is now arriving. A large amount arrives by rail in carload quantities and such service will be continued even if applicant is granted the proposed authority from Vermont. However, consignee occasionally receives a less-carload emergency shipment. Carload traffic transit time ranges from one to 2½ weeks while less-carload traffic ranges from 3½ to 6 weeks, enroute. Recently a shipment composed of five crates, weighing 2,540 pounds, was shipped on April 28 and received on May 27. Four of the crates arrived in good condition and one was broken. A number

of pieces of polished granite were damaged and rendered unfit for the purpose intended. Assertedly adequate pool-car service is not available. Applicant's proposed 5 or 6-day service from Vermont would greatly benefit consignee's [fol. 442] business, which is extremely quiet from November through April but experiences a rush during May because of Memorial Day. Under present circumstances a monument should be delivered sometime in March to assure Memorial Day installation. Dealer's customers prefer Barre granite and applicant's proposed service from Vermont would be utilized at least a half dozen times a year, although there may not always be a complete truckload offered to him. In the past, applicant's service has been used out of South Dakota, and found to be very satisfactory. Admittedly, however, any type of motor carrier service which would deliver its merchandise, within 6 days, from Barre to St. Paul, would satisfy the transportation demands of this consignee.

McCarty Memorials of Hutchinson, Kans., purchases from 40,000 to 60,000 pounds of finished granite a year from Barre manufacturers. Shipments originating at that point move over multiple-rail lines to the Kansas City break-bulk point and then are delivered to consignee at Hutchinson either by local rail service or motor common carrier. It asserts that no through motor carrier service is available from Vermont to Hutchinson and it is interested in obtaining efficient and responsible motor carrier transportation from the named origin area. It would be a distinct advantage to consignee to have less handling of its merchandise in transit since it has experienced considerable breakage on tonnage moving by rail. Moreover, rail shipments must be crated while those moving by motor vehicle need not be. Pool-car shipments from Barre to Hutchinson have been found to take from 14 to 21 days enroute and 3 or 4 days are usually lost at the break-bulk point. Dealer deems an average time for delivery of a shipment from Vermont to be about 10 days. Applicant has assured it, at most, a 9-day delivery service out of Barre. It rarely has need for truckload service but desires less-truckload transportation with split deliveries. Seventy-five percent of its incoming granite is finished and ready for

the customer upon arrival. Generally, consignee's peak period extends from March to June, with April 1, a "cut-off" date for Memorial Day delivery. Available motor carrier transportation such as proposed herein would extend this cut-off time to a later date.

A retail monument dealer in Fremont, Nebr., receives in either pool-car or less-carload quantities, six or seven shipments of granite a year from Vermont, amounting to approximately 25,000 pounds. Because of the size of his business, this dealer considers it advantageous to have motor carrier delivery service. He orders finished stone from the manufacturer whereas a nearby competitor does its own finishing, and in order to meet such competition speedier delivery service is required. Dealer is now receiving granite by motor vehicle from Milbank, St. Cloud, and Cold Spring, Minn. It believes that such service is faster than rail regardless of the distance involved and that there is a real need for applicant's proposed service from Vermont. It is not using applicant out of Milbank because the shipper thereat furnishes its own delivery service. The service of Granite City Transfer has not always been satisfactory and that carrier has never transported any granite from Barre for consignee.

The S. C. Stevenson Monument Works, of Moberly, Mo., uses rail service out of Barre exclusively. Seventeen representative less-carload shipments for 1951, aggregating [fol. 442a] more than 17,000 pounds, averaged 11.5 days in transit, with a minimum of 7 days and a maximum of 18 days enroute. Rail service is considered very good, with little damage to dealer's merchandise, nevertheless, it desires faster and more frequent deliveries during peak seasons. It believes that motor carrier service is more advantageous than rail service and has found multiple-carrier transportation from other origins costly. Intervener, Granite City, service would meet its needs if it were available.

Aberdeen Monument Company of Aberdeen, S. Dak., has need for motor carrier service from Barre. It is unable to stock carload quantities of monuments and pool-car shipments are considered impracticable because of the distance between dealerships. According to consignee, rail

shipments require about 17 days in transit from Barre to Aberdeen and excessive damage to the monuments is experienced on less-carload movements. It considers speedier and more frequent service such as is offered by motor carriage, a distinct business advantage. It would utilize split-deliveries if its tonnage did not warrant a full truckload shipment. Consignee's annual tonnage is about 30,000 pounds.

A retail monument dealer near Rockford, Ill., purchases about 25,000 pounds of custom-designed monuments a year from manufacturers at Barre. These monuments are received monthly in quantities of three or less, and never purchased by the carload. The only transportation service presently available to consignee is by rail. Pool-car shipments break-bulk at Chicago or Proviso, Ill., and the merchandise moves as less-carload freight from there to Rockford where (although consignee is entitled to free delivery to its door) undue delays often occur. As long as one month enroute from Barre to Rockford has been experienced in the movement of the involved monuments, and oil and grease spilled on the markers have also made it necessary to replace complete units. Although all of consignee's business will not be transferred to applicant, it believes that there is a need for motor carrier service from Barre to its place of business.

At the further hearing, Jones Brothers Company and the Rock of Ages Corporation, both of Barre, offered evidence in support of the application. Jones Brothers Company is engaged primarily in the manufacture of granite monuments known as "Guardian Memorials" which are marketed throughout the United States. Ninety percent of its total shipments originate at Barre. In 1951, approximately 1,600,000 pounds of granite moved to destinations in the 16 States sought as destination territory herein. Of this amount 600,000 pounds were less-carload freight. Carload shipments by rail have proven satisfactory, pool-car shipments not entirely satisfactory, and less-carload shipments unsatisfactory. The last named method of transportation is not only costly but takes too long enroute, and shipper has received complaints relative to damage to goods when so moving. It asserts that many small

dealers cannot handle carload tonnage and as a consequence are changing their buying habits by purchasing granite at centers where faster service and cheaper transportation costs are available. It considers this trend a detriment to the granite industry of Vermont. Shipper has available [fol. 443] motor carrier service to New York and Pennsylvania destinations but has none to the destinations involved herein. The availability of a motor carrier performing 6-day-direct-line service to the considered midwest points would be a convenience. Shipper believes that in competing with granite manufacturers located at other origins, it and other manufacturers in the Barre area are handicapped by a lack of such service. It contemplates engaging in private motor carriage if the authority sought herein is not granted. It desires outbound motor carrier transportation on a daily basis, if possible, but has no objection to the consolidation of its freight with that of other Barre granite manufacturers. About 3,000 pounds a day will be available to applicant from this shipper. Applicant has indicated that he will provide service to shipper several times a week and the latter understands that a truckload of granite a day out of Barre is an anticipated volume. All tonnage would originate either at Barre or points within a 5-mile radius thereof. Shipper presently supplies Osborne-Peterson of St. Paul and McCarty Memorials of Hutchinson.

Rock of Ages Corporation quarries granite and manufactures finished monuments and markers which are distributed throughout the United States. It has a plant at Montpelier and another at Northfield, Vt., where shipments move outbound. It is endeavoring to build up its distribution to dealers, particularly those in the 16 States in question. Over 5,000,000 pounds a year are currently shipped to dealers in this 16-State territory, of which 45 purchase in carload quantities, and 168 buy in less-carload amounts. The latter type of shipments are not satisfactory because of delays in transit, damage to the goods, and otherwise rough handling. Pool-car shipments are not considered satisfactory because it is difficult for a dealer to whom the merchandise is consigned to pay the freight charges on an entire car. Considerable rehandling of

tonnage is also required because of lack of rail sidings. Shipper could offer applicant two or more truckloads (ranging from 24,000 to 30,000 pounds each) a week on westbound traffic. It now utilizes motor carrier transportation throughout New England and portions of New Jersey, Pennsylvania, and New York, but not west of a line drawn between Buffalo, N. Y., and Pittsburgh, Pa. Its products are sold to all of the supporting dealers herein with the exception of the consignee at Moberly, Mo. Shipper believes that the use of applicant's proposed service out of Vermont will enable it to get its merchandise to its dealers faster and the latter will not have to tie-up capital in large shipments. It also claims that there is a need for faster and more frequent service out of Barre in order to give the customer a choice of size and design which is not presently feasible under existing transportation conditions. Then again, motor carrier transportation would enable salesmen to obtain new orders and expand their sales area, particularly in such States as Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, and Minnesota.

The Barre Granite Association, whose traffic department is known as the Barre Guild Consolidation Service, is a trade association consisting of 77 member-companies, located in the Barre granite producing area. Five of these members are carriers, 5 do custom sawing and polishing of granite only, and the remaining 67 are manufacturers of finished granite products. Among the larger members of the association are Rock of Ages and Jones Brothers. The function of the association is to represent its members in matters of traffic and shipping and the Guild consolidates [fol. 443a] shipments of granite for pool-car movements out of Barre to points throughout the United States. During the period extending from December 1, 1950 to December 1, 1951, it shipped 268 cars of granite to 900 dealers in 25 States, 156 cars of which were destined to points involved herein. This traffic moved to such break-bulk points as Chicago, Kansas City, St. Louis, Mo., Springfield, Ill., and Davenport, Iowa. Any delays encountered in the movement of this tonnage renders the consolidation service of the Guild inefficient. The only motor carriers se-

lected by the Guild are those used at each end of a rail movement in pick up and delivery service. The Barre and Chelsea Railroad serves the quarries and a substantial portion of its revenue is derived therefrom. The Barre Granite Association does not contemplate discontinuing rail service.

At a further hearing, a representative of the Barre Granite Association indicated that he was delegated by written authorization to represent at least 18 of the member-companies and that the position of these members is substantially the same as that of supporting-shippers Rock of Ages and Jones Brothers. He further asserts that at least 25 or 30 member-companies in the Barre area need the proposed service. The 18 shipper-members represented have a total of more than 1,000 dealers in the 16-State destination area under consideration to which approximately 17,000,000 pounds of granite were shipped in 1951. Witness knows of no direct or connecting-line motor carrier service out of Barre to this mid-western territory. Moreover, he claims that the industry as a whole is not interested in interline motor carrier service due to the fact that granite, because of its size, weight, and susceptibility to damage, is a commodity which cannot be the subject of multiple-handling. The Guild members insist that direct-line service be obtained. The source of supply for granite in Vermont is limited to Washington County (Barre area) and to Williamstown, Orange County.

Granite City Transfer of St. Cloud, is engaged in the transportation of granite, both rough and finished, by motor vehicle. It is authorized, among other things, to transport (1) finished monumental and structural or partially finished granite, over irregular routes, from points in Stearns County, Minn., and Grant County, to points in New York east of New York Highway 96, those in Pennsylvania east of U. S. Highway 15, and to points in New Jersey, Delaware, New Hampshire, Maryland, Vermont, Kentucky, Missouri, Kansas, Oklahoma, District of Columbia, Connecticut, Massachusetts, and Rhode Island, and (2) rough and manufactured granite, between points in Stearns, Wright, and Isanti Counties, Minn., Grant County, and Ashland County, Wis., on the one hand, and, on the

other, points in Minnesota, Wisconsin (except Marathon County), Iowa, Illinois, Nebraska, South Dakota, Indiana, Michigan, Ohio, that portion of Pennsylvania on and west of U. S. Highway 15, and that portion of New York on and west of New York Highway 96, over irregular routes. It operates approximately 10 units of equipment and offers 5 or 6-day service from points in Grant County to points in Vermont, Massachusetts, Connecticut, Maryland, and the District of Columbia. Its headquarters are located about 140 miles from Grant County and asserts it usually has from 2 to 6 days' notice from a shipper relative to a movement of granite outbound from that area. Intervener [fol. 444] asserts that it has received no complaints as to its service from shippers in Grant County and until 18 months prior to the first hearing herein it served the supporting shipper, Dakota Granite Company. Intervener presently transports granite from Milbank for another shipper. However, it has no authority to transport granite from Vermont origins although it admittedly transported two loads from such origins in 1952, without appropriate authority. It averages about 10 loads a month out of Grant County, and possibly 30 loads out of the St. Cloud area. Intervener claims to be ready and able to handle traffic out of Grant County with its present equipment, particularly any moving by private carriage, and believes that it would lose at least two loads of granite a month destined to the involved eastern territory if applicant obtained the authority sought herein. Intervener also claims to have lost business due to a rate differential when applicant obtained its present operating authority out of Grant County.

Evidence was also submitted in opposition to the application on behalf of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the Texas and New Orleans Railroad Company, and the Central Vermont Railway Company. Milbank, S. Dak., is on the main line of the Milwaukee Railroad, from which point it renders direct service to Chicago where it connects with a number of other rail carriers for service to the points and areas involved in the application. The Texas and New Orleans Company is primarily concerned with the proposed transportation by applicant from Grant County and Vermont to points in

Louisiana and Texas throughout which destination area it offers both rail and motor carrier service. The Central Vermont Railway originates traffic in granite at four of its stations, namely, Barre, Montpelier, Northfield, and Waterbury, Vt., and competes with the Barre and Chelsea Railroad for the outbound movement of granite from that area. All of these rail carriers are ready and able to handle the traffic considered herein and regard the granting of the instant application as having a future adverse affect on their operating revenue.

The shippers or receivers supporting the application have experienced difficulty in obtaining the type of service which best meets their transportation needs. In the past, rail service has been a predominant means of delivering the freight involved but the use of rail service has not been, except in carload quantities, entirely satisfactory, principally because of delays in transit, damaged goods, and lack of proper rail sidings. No motor carriers oppose the application insofar as the proposed operation from Vermont is concerned and only one objects to the proposed extension from Grant County. The Barre area shippers complain that there is no motor carrier service available to them for the proper transportation of granite to their involved destinations. Moreover, they assert, the changing competitive situation in the destination territory makes it necessary that this traffic move by motor vehicle as well as by rail. The commodity involved requires careful handling and interchange is not feasible. As seen, applicant now satisfactorily serves the supporting shipper from Grant County and that shipper complains of unsatisfactory conditions existing when shipping by rail to the destination area covered by this portion of the application. It believes that applicant is in a better position to handle its traffic than intervener Granite City Transfer (which service has not been utilized for two years) and existing dry [fol. 444a] freight motor carriers. Applicant is located near its place of business and can more efficiently handle consolidated shipments moving to both presently served destinations and those sought herein.

Authorizing the proposed operations to the extent hereinafter indicated will enable applicant to render a complete

service to all the shippers' destination points in accordance with their requirements. The difficulties experienced by them would be overcome by the use of such a direct motor carrier service. Applicant has the experience, skill, and facilities to satisfy the shippers' requirements. All things considered, the examiner concludes that a need has been shown for the proposed service to the extent indicated in the findings herein. Undoubtedly, a grant of such authority will result in the diversion of some traffic from the opposing rail carriers, but it appears that such diversions will not be so substantial as to impair materially their operations. Moreover, the authority granted herein will have no material adverse affect on any motor carriers, including intervener Granite City Transfer.

The examiner finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite, rough and finished, (1) from points in Grant County, S. Dak., to points in Wyoming, North Dakota, Texas, Arkansas, Louisiana, West Virginia, Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia, and (2) from points in Washington and Orange Counties, Vt., to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By Richard H. Roberts, Examiner.

(Signature) Richard H. Roberts

[fol. 445] Recommended by Richard H. Roberts, Examiner.

(Signature) Richard H. Roberts

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the day of A. D. 1953.

No. MC–93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with the requirements of sections 215 and 217 of the Interstate Commerce Act, and with our rules and regulations thereunder, a certificate be issued to applicant authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 5.

George W. Laird, Acting Secretary.

(SEAL)

[fol. 729] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

Civil No. 624 N.D.

A. W. SCHAFFER, d/b/a SCHAFFER TRANSPORTATION COMPANY,

and

AMERICAN TRUCKING ASSOCIATIONS, INC., Plaintiffs,

v.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION, Defendants.

OPINION—March 13, 1956

Donald A. Morken, Minneapolis, Minn., (R. G. May, Sioux Falls, S.D., with him on the brief), Attorneys for Plaintiff, Schaffer.

Peter T. Beardsley, Washington, D.C., Attorney for American Trucking Associations, Inc.

H. Neil Garson and Robert W. Ginnane, Washington, D.C., Attorneys for Interstate Commerce Commission.

James E. Kilday and Edward Knuff, Washington, D.C., (Stanley N. Barnes, Assistant Attorney General and Clinton G. Richards, United States Attorney, with them on the brief), Attorneys for United States of America.

Robert J. Bernard, and H. F. Chapman, Sioux Falls, S.D., R. W. Cronon, Joseph Hays and Carl Helmetag, Jr., Philadelphia, Pa., James G. Lane, Amos N. Mathews and James W. Nisbet, Chicago, Ill., Attorneys for Intervening Railroads.

Before VOGEL, Circuit Judge, and MICKELSON and DEVITT, District Judges.

MICKELSON, District Judge.

This statutory three-judge court action was brought by the plaintiffs to set aside the report and order of the Inter-

state Commerce Commission pursuant to Sec. 205(g) of the Interstate Commerce Act, 49 USC, Sec. 305(g), Sec. 10, [fol. 730] of the Administrative Procedure Act, 5 USC, Sec. 1009 and Sec. 1336, 1398, 2284, 2321 to 2325, of the Judicial Code, 28 USC, Sec. 1336, 1398, 2284 and 2321-2325, incl. That report and order was entered by the Commission in Docket No. MC-93529 (Sub. No. 2), A. W. Schaffer Extension—Granite.

The applicant, A. W. Schaffer, d/b/a Schaffer Transportation Company, sought authority to operate as a common carrier by motor vehicle in interstate or foreign commerce, over irregular routes, in the transportation of granite, manufactured and rough:

(1) From points in Grant County, South Dakota, to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota and the District of Columbia;

(2) From points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas and Louisiana.

The original hearing on the application before an examiner for the Commission was held June 13, 1952. Prior to the issuance of the examiner's recommended report and order applicant petitioned for a further hearing. By order dated September 9, 1952, the matter was reopened for further hearing, which was held on December 2, 1952, before the same examiner. Protests against the application were filed by rail carriers in New England territory on June 14, 1951; by Texas Railroad Association and Class 1 Rail Carriers in Southwestern Line territory on June 18, 1951; and by Trunk Line Central territory railroads, except the C. & O. Ry. Co., on July 9, 1951. Wm. Dingmann, d/b/a Granite City Transfer, of St. Cloud, Minn. appeared in opposition to the application in addition to the protesting railroads. At the further hearing, in addition to the parties noted above appearing in opposition to the application, Class 1 Western [fol. 731] Rail Carriers also intervened in opposition thereto.

On February 10, 1952, the examiner issued his report and recommended order that the authority requested by the applicant be granted.

Exceptions to the examiner's report and recommended order were filed by Class 1 Western Trunk Line Rail Carriers, by Wm. Dingmann, d/b/a Granite City Transfer, and by the eastern railroads, except the C. & O. Ry. Co.

Thereafter the Commission, Division 5, with Commissioner Elliott dissenting, issued its report and order, decided May 24, 1954, granting the authority sought by the applicant and as recommended by the examiner except that it denied the authority from Grant County, South Dakota, to points in the states of Maryland, Connecticut, Massachusetts, Vermont and the District of Columbia, because of motor carrier service then in existence furnished by Wm. Dingmann, d/b/a Granite City Transfer, the protesting motor carrier.

Following the report and order of Division 5, a petition for reconsideration, and, in the alternative, a petition for a hearing de nova, was filed by the eastern railroads. A similar pleading was filed by the Class 1 Western Trunk Line Rail Carriers.

By order entered Nov. 12, 1954, the Commission, Division 5, granted the petitions for reconsideration but denied the petitions in all other respects. The entire Commission thereafter took up the matter and on Feb. 7, 1954, entered its order with an accompanying report, denying the application. This is the report and order which is challenged by the plaintiffs herein.

[fol. 732] On March 7, 1955, Barre Granite Assn., Jones Bros., and Rock of Ages Corporation of Barre, Vermont, filed a petition for intervention, oral argument and reconsideration. Schaffer on the same date filed a petition for oral argument and reconsideration. On March 9, 1955, plaintiff, American Trucking Assn., filed a petition for leave to intervene and for reconsideration. Replies to these petitions were filed by eastern railroads, except the C. & O. Ry. Co., and by the Class 1 Western Trunk Line Rail Carriers.

On May 16, 1955, the Commission entered an order permitting the parties seeking intervention to intervene and denying the petitions in all other respects.

On August 8, 1955, plaintiffs filed the instant complaint in this court, seeking to set aside the Commission's report and order of Feb. 7, 1954, which denied authority, and the order of May 16, 1955, which permitted the parties seeking intervention to intervene and which denied the petitions for reconsideration.

The transcript of testimony before the Commission consists of 341 pages and 24 exhibits, in addition to numerous voluminous pleadings which were filed with the Commission for its consideration.

The principal issues raised in this case are whether there is a reasonable and rational basis for the orders predicated upon the findings of the Commission and whether the Commission's actions in the premises complies with the Congressional mandate as set forth in Part 2 of the Interstate Commerce Act. (49 USC 301-327) and the National Transportation Policy, (49 USC, preceding Sec. 1).

The scope of judicial review of the decisions of independent administrative bodies, in this case the Interstate [fol. 733] Commerce Commission, is now well settled and is no longer open to question. The rule may be stated in various ways, one of which is, that findings of fact and permissible conclusions thereon, based upon substantial evidence, are final, conclusive and binding upon the Court. I.C.C. v Union Pacific R.R. Co., 222 U.S. 541, 547-548. In U.S. v Pierce Auto Freight Lines, Inc., 327 U.S. 515, 536, the Supreme Court said that the function of a reviewing court "* * * is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law, or abuse of the Commission's discretion, a reviewing court is without authority to intervene."

In the development of the doctrine and rule of administrative finality, courts have uniformly held that it is the exclusive province and function of administrative agencies to draw legitimate inferences of fact and make findings and conclusions of fact, to appraise conflicting testimony or other evidence, to judge the credibility of witnesses and the evidence adduced by the parties, and to determine the weight of the evidence. Ill. Cent. R.R. Co. v I.C.C., 206 U.S.

441-454; I.C.C. v Union Pacific R.R. Co., supra; Alton R.R. Co v U.S., 315 U.S. 15-23. And what has just been said holds true even though the court believes that the decision of the administrative body lacks wisdom; though the court would weigh the evidence differently and reach a different conclusion from that of the agency; or that the final decision is inconsistent with prior determinations arising under analagous or similar basic circumstances. Rochester Tele. Corp. v U.S., 307 U.S. 125, 146, at p. 139; I.C.C. v Nor. Pac. [fol. 734] R.R. Co., 216 U.S. 538, 544; Ill. Cent. R.R. Co. v I.C.C., supra, p. 454; U.S. v Pierce Auto Freight Lines, Inc., supra.

Sec. 10 of the Administrative Procedure Act, (5 USC, Sec. 1009) has codified the limitations of a judicial review of administrative decisions, and that act is controlling. See Riss & Co. Inc. v U.S., 341 U.S. 907; Wong Yang Sung v. McGrath, 339 U.S. 33; Acme Fast Freight v. U.S., 116 Fed. Supp. 97.

Plaintiffs in this case mainly urge that the Commission's conclusion is not supported by substantial evidence and therefore is unsupported by the record, is arbitrary and contrary to law. They also ask this Court to consider and make findings with respect to the fact that the public is entitled to service by both forms of transportation, trucks and rail.

In final analysis the Commission was required to determine that the proposed service of applicant is or will be required by the present or future public convenience and necessity under 49 USC, 307(a).

The extent of the Commission's authority in matters concerning the grant or denial of a certificate of public convenience and necessity has been considered in numerous judicial decisions and appears to be well settled. In an early leading case, C. & O. Ry. Co. v. U.S., 283 U.S. 35, 42, the Supreme Court said:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question."

See Also T. & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co., 270 U.S. 266, 273; Colorado v. U.S., 271 U.S. 153, 168; [fol. 735] Powell v. U.S., 300 U.S. 276, 287.

In the case of Interstate Commerce Commission v. Parker, 326 U.S., 60, 65, the Supreme Court stated:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of the government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which has been employed for similar purposes for railroads in the same Act since the Transportation Act of 1920, Section 402(18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. Case v. Los Angeles Lumber Co., 308 U.S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. C. & O. Ry. Co. v. U.S., 283 U.S. 35, 42. Cf. Gray v. Powell, 314 U.S. 402, 411-12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service would serve public convenience and necessity. Cf. Powell v. U.S., 300 U.S. 276, 287. This, of course, gives administrative discretion to the Commission, Cf. McLean Trucking Co. v. U.S., 321 U.S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

Plaintiffs herein contend that the public is entitled to service by both forms of transportation, truck and rail, under a proper interpretation of the National Transportation Policy and the provisions of the Interstate Commerce Act.

As to the first contention, the Commission has spoken many times, and very recently in the case of International

Transport, Inc. Extension—Tractors and Farm Machinery, No. MC 113855, and Kenosha Auto Transport Corp. Extension—Racine, Wis., No. MC 30837, Sub. 159, decided Dec. 16, 1955, and subsequent to its decision here under review. In these cases (decided together) the Commission, Division 1, said:

> "The basic issues raised by petitioners are, in substance:
>
> (1) Whether the supporting shippers who allegedly are dependent solely upon rail carriers for transporta- [fol. 736] tion are entitled, as a matter of law, to motor as well as rail service.
>
> (2) Whether each applicant has sustained the burden of proving that the supporting shippers are unable to obtain reasonably adequate service from the existing rail carriers and have a real need for the proposed motor service to supplement rail service."

The Commission did, in those cases, grant the authority sought, and applicant here urges these cases as authority for the contention that if the Schaffer application was before the Commission at the present time, the authority sought would be granted. We do not think these cases can be so interpreted. There the Commission said:

> "At the outset it is well to stress that the mere absence of motor carrier service is not, standing alone, sufficient justification for the granting of an application to institute such service. In numerous proceedings where a grant of motor carrier authority has been made, it has been stated that the public is entitled to both motor and rail service. However, in all such proceedings it has been found, as required by the statute, that public convenience and necessity required the proposed service, and such findings were based on all of the facts of record in each proceeding including the nonexistence of reasonably adequate motor carrier service. Any implication which might be drawn from the report in these proceedings that the mere absence of motor service, without more, is enough to justify a grant of motor carrier authority, is inaccurate."

The Commission there also said, in granting the authority, that the over-all rail service had been something less than reasonably adequate for the supporting shippers' needs. In the present case the full Commission found, upon the question of public convenience and necessity, that existing rail service was "reasonably adequate."

When called upon to review orders of the Commission denying or granting certificates of convenience and necessity based on the adequacy or inadequacy of existing services, the courts have approved the test used by the Commission. Capitol Transit Co. v U.S., 97 Fed. Supp. 614, 620; Hudson [fol. 737] Transit Line v U.S., 82 Fed. Supp. 153, 157; McLean Trucking Co. v. U.S. 63 Fed. Supp. 829, 832.

In confirming this general principle it seems quite clear that the Courts are of the same view as the Commission, namely, that the adequacy of the existing service is to be determined by weighing the needs of the shippers against the capabilities and facilities of the existing carriers without regard to whether the existing service is provided by the railroads or other motor carriers. See I.C.C. v. Parker, supra.

While in the instant case the examiner did recommend the granting of the proposed authority and Division 5 of the Commission in a two to one decision ordered the authority granted (except as to certain points hereinbefore mentioned served by Dingmann), and the full Commission in a six to four decision, with one member not participating, did upon the same record deny the authority; such is not enough for this Court to cancel and set aside the final order of the Commission. The fact that such difference of opinion existed in the minds of the examiner, the members of Division 5 and the full Commission, all experts in the field of public transportation, serves to stress the fact the reasonable minds can and did differ upon the weight of the evidence and the conclusions to be drawn therefrom, in determining the ultimate question of the granting or refusal of the authority sought by the applicant, Schaffer.

We have carefully reviewed the evidence in this case, and without detailing it, we are unable to say that the Commission's conclusions and orders are not supported by substantial evidence, or that it acted illegally, arbitrarily or capriciously.

While we wish to note that had we been acting in place of the Commission in this case, we may have reached different conclusions, this fact will not justify our setting aside the report and orders of the Commission. I.C.C. v. Union Pacific R.R. Co., supra; Miss. Valley Barge Line Co. v. U.S., 292 U.S. 282, 287; Rochester Tele. Corp. v U. S., supra; Universal Camera Corp. v Labor Board, 340 U.S. 474, 497.

Plaintiff, American Trucking Association, particularly argues that the Commission in this case has acted contrary to and has not carried out the National Transportation Policy, (49 USC. preceding Sec. 1). And, further, that the Commission in recent years has changed its policy in determining public convenience and necessity. We cannot agree with either of these contentions as a matter of law. The burden of proof showing a need for the proposed service under the provisions of Sec. 207(a) of the Interstate Commerce Act was upon the plaintiff. The Commission did not deny the application on the ground that rail service in and of itself was adequate. It purported to weigh all of the salient factors constituting proof of need for the service and in the light of the entire record found that there wasn't any need for the service which could not be handled adequately by existing carriers, both motor and rail.

The Commission is not required to set forth its findings in the terms of the provisions of the National Transportation Policy. In Luckenbach S.S. Co. v U.S., 122 Fed. Supp. 824, affirmed per curiam, 347 U.S. 984, Judge Hand, pp 827-8, said:

> "It is clear that the expressed policy must serve as a guide to the Commission in all its decisions. United States v. Great Northern R. Co., 343 U.S. 562, 576, 72 S. Ct. 985, 96 L. Ed. 1142; McLean Trucking Co. v. United States, 321 U.S. 67, 82-84, 64 S. Ct. 370, 88 L. Ed. 544. However it seems equally clear that the Commission can not and should not be required to dis- [fol. 739] cuss each consideration expressed in the National Transportation Policy in every decision it renders. 'The basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented.'

Alabama Great Southern R. Co. v. United States, 340 U.S. 216, 288; 71 S. Ct. 264, 95 L. Ed. 225. It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function. See Newtex S.S. Corp. v United States, D.C., S.D.N.Y., 107 Fed. Supp. 388, affirmed 344, U.S. 901, 73 S. Ct. 285, 97 L. Ed. 696; Capital Transit Co. v. United States, D.C., D.C., 97 Fed. Supp. 614, 621."

While the Commission in its final report changed its mind, this does not constitute reversible error subject to review by this court. In Beard-Laney v. U.S., 83 Fed. Supp. 27, 33, affirmed 338 U.S. 803, Judge Parker said:

"The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of the prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the fact it has arrived at a different conclusion from that which its hearing division had first expressed. Lang Transp. Co. v. United States, D.C., 75 F. Supp. 915, 925."

While, as above indicated, this Court may have reached a different conclusion if it had been weighing the evidence in this case, we must and do find that the Commission acted within the scope of its authority, that it acted without abuse of its discretion, that its action was not arbitrary or capricious, and that there were adequate facts to support its findings and that its conclusions are not contrary to law.

For the reasons hereinbefore stated plaintiff's complaint will be dismissed.

March 13, 1956.

[fol. 740]

By The Court: Charles J. Vogel, United States Circuit Judge.
George T. Mickelson, United States District Judge.
Edward J. Devitt, United States District Judge.

[fol. 742] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

Civil Action

File No. 624 N. D.

A. W. SCHAFFER, d/b/a SCHAFFER TRANSPORTATION COMPANY, and AMERICAN TRUCKING ASSOCIATIONS, INC., Plaintiffs

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Defendants.

JUDGMENT—May 17, 1956

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on January 24, 1956, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on March 13, 1956, filed herein its opinion, holding that the order of the Commission denying a certificate of public convenience and necessity to engage in interstate or foreign operations by motor vehicle on public highways is legal and valid, it is hereby

[fol. 743] ORDERED, ADJUDGED, AND DECREED that the relief prayed for by plaintiff, be, and the same hereby is denied, and the complaint be, and the same hereby is dismissed.

This the 17th day of May, 1956.

Charles J. Vogel, United States Circuit Judge,
George T. Mickelson, United States District Judge,
Edward J. Devitt, United States District Judge.

Attest: Roy B. Marker, Clerk.

(SEAL OF COURT)

[fol. 745] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

Civil Action No. 624 N. D.

A. W. SCHAFFER, d/b/a SCHAFFER TRANSPORTATION COMPANY, and AMERICAN TRUCKING ASSOCIATIONS, INC., Plaintiffs

v.

INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 19, 1956

I

Notice is hereby given that A. W. Schaffer, d/b/a Schaffer Transportation Company, and American Trucking Associations, Inc., the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment dismissing the complaint entered in this action on May 25, 1956.

This appeal is taken pursuant to 28 U.S.C.A. §1253.

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Complaint, dated August 8, 1955, including Appendix A, the report and order of the Commission, Division 5, dated May 24, 1954, Appendix B, the report and order of the [fol. 746] entire Commission, dated February 7, 1955, and Appendix C, the order of the Commission, dated May 16, 1955, denying reconsideration.

(b) Answer of Interstate Commerce Commission, dated September 27, 1955.

(c) Answer of United States, dated September 28, 1955.

(d) Motion and Notice of Motion of Intervening Railroads for Leave to Intervene, Order Permitting Intervention, Stipulation and Answer of Intervening Railroads, all dated December 27, 1955.

(e) Opinion, dated March 13, 1956.

(f) Judgment, dated May 25, 1956.

(g) Transcript of testimony, and exhibits, before the Interstate Commerce Commission.

(h) This notice of appeal.

III

The question presented for the Court's consideration in this proceeding may be simply stated. It is:

> Is a motor carrier, in applying for operating authority pursuant to the provisions of Section 207 of the Interstate Commerce Act (49 U.S.C.A. §307) required to prove that existing *rail* service is inadequate?

Stated another way, the question may be put thusly:

> Under the scheme of regulation adopted by Congress and embodied in the Interstate Commerce Act and the National Transportation Policy, are the shippers of the country entitled to service by all available forms of [fol. 747] transport, or may the Interstate Commerce Commission determine that only the services of rail transport shall be utilized?

Respectfully submitted,

R. G. May, Donald A. Morken, Attorneys for A. W. Schaffer d/b/a Schaffer Transportation Company

Peter T. Beardsley, Fritz R. Kahn, R. G. May, Harry E. Boot, Attorneys for American Trucking Associations, Inc.

1424 Sixteenth Street, N. W., Washington, D. C.

Due: July 25, 1956.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 754] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 755] SUPREME COURT OF THE UNITED STATES

No. 419, October Term, 1956

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.

ORDER NOTING PROBABLE JURISDICTION—December 3, 1956

APPEAL from the United States District Court for the Northern District of South Dakota.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. Oral argument will be limited to 45 minutes a side.

December 3, 1956

Office Supreme Court, U.S.
FILED
SEP 14 1956
JOHN T. FEY, Clerk

No. ~~419~~ 20

IN THE

Supreme Court of the United States

October Term, 1956

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of South Dakota, Northern Division

JURISDICTIONAL STATEMENT

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No.

In The

Supreme Court of the United States

October Term, 1956

Schaffer Transportation Company and
American Trucking Associations, Inc., *Appellants*,

v.

United States of America and Interstate Commerce
Commission, *Appellees*.

On Appeal from the United States District Court for the District of South Dakota, Northern Division

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JURISDICTIONAL STATEMENT

Appellants, A. W. Schaffer, doing business as Schaffer Transportation Company, and American Trucking Associations, Inc., hereinafter called Schaffer and A.T.A., appeal from the judgment of the United States District Court for the District of South Dakota, Northern Division, entered on May 25, 1956, sustaining an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court is reported at 139 F. Supp. 444, and a copy is attached hereto as Appendix

A. A copy of the judgment of the District Court is attached hereto as Appendix B. A copy of the report and order of Division 5 of the Commission, holding that the public convenience and necessity required Schaffer's proposed operations, is attached hereto as Appendix C. A copy of the report and order of the Commission, 63 M.C.C. 247, reversing the decision of Division 5, is attached hereto as Appendix D. A copy of the Commission's order of May 16, 1955, granting A.T.A. leave to intervene but denying reconsideration and oral argument, is attached hereto as Appendix E.

JURISDICTION

This suit was brought to set aside the report and order of February 7, 1955, of the appellee, Interstate Commerce Commission, in Docket No. MC-93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, 63 M.C.C. 247, pursuant to Section 205(g) of the Interstate Commerce Act, 49 U.S.C. § 305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, and Sections 1336, 1398, 2284 and 2321-2325, inclusive, of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325. The judgment of the United States District Court for the District of South Dakota, Northern Division, was entered on May 25, 1956, and notice of appeal was filed in that Court on July 19, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Contract Steel Carriers, Inc.* —— U.S. ——, 76 S. Ct. 461; *United States* v. *Watson Bros. Transportation Co.*, —— U.S. ——, 76 S. Ct. 302; *M & M Transportation Company* v. *United States*, 350 U.S. 857.

QUESTION PRESENTED

Is a motor carrier, in applying for operating authority pursuant to the provisions of Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307, required to prove that existing *rail* service is inadequate?

Stated another way, the question may be put thusly:

Under the scheme of regulation adopted by Congress and embodied in the Interstate Commerce Act and the National Transportation Policy are the shippers of the country entitled to service by all available forms of transport, or may the Interstate Commerce Commission determine that only the services of rail transport shall be utilized?

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 206 and 207 of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 306, 307, are set forth verbatim in Appendix F hereof.

STATEMENT

This proceeding affords this Court the first opportunity to pass on the power of the Commission to refuse to allow the institution of motor carrier service because of the availability to the shippers, who desire and support the need for such service, of *rail* service which the Commission considers adequate or "reasonably" so. The answer to the question posed is important as a guide to the Interstate Commerce Commission in its administration of the Interstate Commerce Act and to the shippers of the country who desire to use service by motor vehicle, as well as that offered by rail carriers.

For the first fifteen years of federal regulation of motor vehicles operating in interstate commerce pursuant to the Motor Carrier Act of 1935,[1] the Interstate Commerce Commission consistently held that shippers were entitled to adequate service by motor vehicle as well as rail. However, commencing in 1950, the Commission made an abrupt about-face, and in several cases concluded that motor carrier authority would not be granted where the applicant failed to show that existing rail service was inadequate to meet the shippers' needs.[2]

The Commission's departure from the established policy of fostering reasonable competition between the various modes of transportation subject to its jurisdiction is a matter of serious concern to the trucking industry. In order to test the validity of the Commission's newly-developed theory that existence of adequate *rail* service bars the right to institute service by motor vehicle, appellant A.T.A. has intervened in several application proceedings before the Commission in which it has adopted that theory.[3] However, in each of the cases referred to the Commission has simply decided, on the same record,[4]

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[1] 49 Stat. 543 *et seq.*, now Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 *et seq.*

[2] *Kenosha Auto Transp. Corp. Ext.*, 52 M.C.C. 123, *Hayes Freight Lines Inc., Ext.—Ball Clay*, 52 M.C.C. 303.

[3] Docket No. MC-10900 (Sub-No. 16), *McCullough Transfer Co. —Extension—Cement in Bulk* (January 6, 1953); Docket No. MC-111472 (Sub-No. 20), *Diamond Transportation System, Inc., —Extension—Burlington, Iowa* (May 11, 1954); Docket No. MC-11785 (Sub-No. 2), *Fred C. Burns—Extension—Rough Lumber* (November 15, 1954); Docket No. MC-113855, *International Transport, Inc.,—Extension—Tractors and Farm Machinery* (February 15, 1955); Docket No. MC-29886 (Sub-No. 72), *Dallas & Mavis Fwdg. Co., Inc., Ext.—Sweepers* (October 17, 1955).

[4] Except in the *McCullough* case, *supra*. When the Commission denied reconsideration in *McCullough*, complaint was filed by the applicant therein and A.T.A. in the U. S. District Court for the

that the rail service first considered adequate was, on reconsideration, inadequate to meet the shippers' needs, and therefore motor carrier authority should be granted.

The importance to the motor carrier industry of the question presented here is obvious. If the Commission's construction of the law is correct, motor carriers will never get a chance to compete with the railroads in many instances, for a finding by the Commission that the existing rail service is reasonably adequate will, *ipso facto*, bar the institution of motor carrier service. In addition, certain shippers will find themselves, with only rail service to rely on, attempting to compete in common marketplaces with other shippers having the benefit, as to both rates and service, of competition between the two forms of transportation.

The Commission's report on reconsideration complained of herein violates the underlying purpose of the Interstate Commerce Act and contravenes the provisions of the National Transportation Policy in arbitrarily refusing to authorize the institution of the motor carrier service sought to be provided, and thereby promoting railroad monopoly.

By application filed May 28, 1951, as amended, Schaffer sought from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing operations, in interstate commerce, as a common carrier by motor vehicle of granite, manufactured and rough, (1) from points in Grant County, South Dakota, to points in ten states (primarily in the East) and the District of Columbia, and (2) from points in Vermont to points in

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Northern District of Ohio (Eastern Division) to test the validity of its ruling. However, before the court case had proceeded further, the Commission reopened its docket, held further hearings and ultimately authorized three motor carriers to transport cement in bulk, the commodity in question.

sixteen states (primarily in the Midwest), over irregular routes. After appropriate proceedings, the report and order of Division 5 of the Commission in Docket No. MC-93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, dated May 24, 1954, found that the public convenience and necessity required the proposed operations substantially as requested,[5] that Schaffer was fit, willing and able properly to perform such service and to conform to the applicable laws and regulations and that a certificate authorizing such operations should be granted.

Following petition of numerous protestant railroads, Division 5, by order of November 12, 1954, reopened the proceeding for reconsideration on the same record. Subsequently, the entire Commission assumed jurisdiction of the proceeding. The report and order of the Commission dated February 7, 1955, 63 M.C.C. 247, reversed the decision of Division 5 and stated that the record did not sustain the prior finding that public convenience and necessity required the proposed operations. The Commission, Commissioners Cross, Arpaia, Clarke and Winchell, dissenting, determined that the application should be denied, and the prior order of May 24, 1954, was vacated and set aside.[6]

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[5] Because Dingmann, the only motor carrier protestant, is authorized to transport granite from points in Grant County, S. D., to points in certain states covered by Schaffer's application, and because Dingmann's service was not shown to be unsatisfactory, Division 5 denied Schaffer's request for authority to serve points covered by Dingmann's certificate, i.e., Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. Neither of the appellants complains as to this partial denial.

[6] The desirability of review by this Court, in order to settle finally the question involved herein, is emphasized by the closeness of the vote in the Commission. The vote of six to four (one Commissioner not participating) denying Schaffer's application resulted when one of the Commissioners who, as a member of Division 5 had voted to grant the application, changed his vote on reconsideration.

It is noted that the advance sheets reporting the Commission's

By petition dated March 4, 1955, Schaffer requested reconsideration by, and oral argument before, the Interstate Commerce Commission. By petition dated March 9, 1955, A.T.A. requested leave to intervene, reconsideration by and oral argument before, the Commission. By order of May 16, 1955, the Interstate Commerce Commission granted leave to intervene to A.T.A., but denied the petitions for reconsideration and oral argument.

Appellants, plaintiffs below, brought this action in the District Court to review the ruling of the Commission. The Court twice indicated in its opinion that it disagreed with the Commission's ultimate conclusion that public convenience and necessity did not require that Schaffer's application be granted, (139 F. Supp. 450, 452); nevertheless, it found that the Commission acted within the scope of its authority, without abuse of discretion, that its action was not arbitrary or capricious, that there were adequate facts to support its findings and that its conclusions were not contrary to law, and dismissed the complaint.

THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal is of importance to the shipping public, the motor carrier and railroad industries, and to the administration of the Interstate Commerce Act. The report and order of the Commission which gave rise to this proceeding flouts the mandate of the National Transportation Policy, in that it denies to the shippers involved the inherent advantages of the motor carrier service sought to be provided, and in so doing

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decision are in error in failing to show Commissioner Winchell as dissenting, as indicated by the Commission's official minutes. This error has been called to the Commission's attention and we have been informally advised by the Secretary's office that the bound volume will be corrected.

fails to promote the adequate, economical and efficient service which can only be achieved through reasonable competition between the various forms of transportation subject to its jurisdiction. The District Court erred in failing to find that the basic reason for the denial of the authority sought was the Commission's determination that the existing rail service was adequate to meet the supporting shippers' needs. The Court's holding that this was not the basis for the Commission's action (139 F. Supp. 451) is erroneous, at least to the extent that it fails to recognize that the Commission's report and order are substantially, if not completely, dependent for support upon its conclusion that rail service was all that the supporting shippers really needed.

1. From the earliest times, the Commission has recognized that the Interstate Commerce Act requires the maintenance of competition between the transportation agencies subject to its jurisdiction. In one of its first opinions, written by Chairman Cooley, in *Re Southern Railway & Steamship Asso.*, 1 I.C.C. 278, 287, (1887) it is stated:

> In thus deliberately making provision for competition . . . Congress must be supposed to have done so because the public interest required it. That competition is the life of trade is one of the most generally accepted of maxims; among its principal benefits is the protection it gives against extortionate charges.

And [illegible] years later, in *Naval Stores From Mississippi to Gu[illegible]* 35 I.C.C. 723, 733 (1940), the Commission said:

> Healthy competition between different agencies of transportation is undoubtedly in the public interest.

This Court has itself pointed out that the Commission "is trusted by Congress to guard against the danger of the development of a transportation monopoly. * * * It has the duty to preserve the inherent advantages of each mode of transportation." *I.C.C.* v. *Parker*, 326 U.S. 60, 73.

2. From the outset of federal regulation of motor carriers the Commission consistently recognized that the policy of Congress required it to make available to the shippers of the country adequate motor vehicle, as well as rail, service. This policy was established in conformance with the provisions of Section 202(a) of the Motor Carrier Act, 1935, reading, in part, as follows:

> ". . . to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest, promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices . . ."

In one of the earliest decisions construing the cited language, *Bowles Common Carrier Application*, 1 M.C.C. 589, 591 (1937), the report of the Commission, Division 5, states:

> Interveners point out that the growth of motor-carrier transportation, and consequent diversion of traffic from the rails to the highways, has contributed to large traffic losses by rail carriers, a diminution of their revenues, and an impairment of the value of their securities. They contend that the public convenience and necessity do not require the proposed services and that the grant of a certificate to applicant would be inconsistent with the policy of Congress declared in section 202(a) of the Act. One of the bases for this contention is that all of the origins and all of the destinations, except Elkhorn, now have adequate service by rail. We are advised by statute that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation, but we are also directed in section 202(a) to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages. There are certain inherent advantages in the transportation of petroleum products by motor

vehicle. Among these are the reduction in amount of gasoline and other petroleum products which jobbers must keep on hand in storage tanks, and the elimination of the expense of trucking rail shipments of such products at destinations from tank cars to those jobbers who do not have storage facilities adjacent to the rail carriers' tracks. *That a particular point has adequate rail service is not a sufficient reason for denial of a certificate; shippers and consignees of petroleum are entitled to adequate service by motor vehicle as well as by rail.* (Emphasis ours.)

The principle established in the *Boucles* case was followed down through the years in a multitude of cases involving applications by motor carriers. See, e. g., *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567, 571. And when denial of applications filed by water carriers and freight forwarders was urged on the ground that existing rail and truck service was adequate to meet the shippers' needs, the Commission has uniformly held that shippers are also entitled to adequate water carrier and freight forwarder service. *Commercial Barge Lines, Inc., Ext.—Automobiles*, 260 I.C.C. 701, 709; *Goldberg Freight Forwarder Application*, 285 I.C.C. 239.

The Commission, Division 4, has quite recently reiterated this view. In Docket No. W-381 (Sub-No. 5); *Federal Barge Lines, Inc., Extension—Sioux City*, decided July 31, 1956, it is stated:

> Moreover, even though the evidence indicates that shippers in the territory involved have adequate rail and motor service and that the proposed service would provide low-cost transportation such a showing, standing alone, does not warrant denial of an application for authority to perform water carrier operations. See *War Shipping Administration T. A. Application*, 260 I.C.C. 589; and *Inland Waterways Corp. Extension of Operations—Omaha*, 265 I.C.C. 207. Under part III of the act it has been found that the shipping public is entitled to the inherent advantages of water as well as rail service where a need for water transportation is shown.

Congress, by the Transportation Act of 1940, 54 Stat. 899 *et seq.*, repeated and substantially reenacted the provisions of Section 202(a) of the Motor Carrier Act as part of the National Transportation Policy. It must be presumed to have done so with full knowledge of the Commission's construction of Section 202(a), and to have approved and confirmed such construction. *N. Y., N. H., & H. R. Co.* v. *I.C.C.*, 200 U.S. 361.

As this Court said, in *Brewster* v. *Gage*, 280 U.S. 327, 337:

> The substantial reenactment in later acts of the provision theretofore construed by the Department is persuasive evidence of legislative approval of the regulation (citing cases). The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.

3. Despite its consistent interpretation, uniformly followed for many years, and despite Congressional approval thereof, the Commission has recently reversed its long-standing policy, as it has done herein, and now holds that motor carrier service may not be authorized unless it is first shown that existing rail service is not adequate for the shippers' needs. The fact that such a policy does violence to the Interstate Commerce Act and the National Transportation Policy is emphasized by the Commission's contemporaneous holding, in other proceedings, that motor carrier service has certain inherent advantages which can not be duplicated by rail service. Thus, in *Canned Goods in Official Territory*, 294 I.C.C. 371, 379, the report of the Commission states:

> There are inherent advantages of motor transportation which have no counterpart in rail service. It is individualized, expedited, and more flexible than rail transportation.

A comparison of the rationale of the decision herein and the cited language of the *Canned Goods case* affords a strange contrast—on the one hand, in this proceeding,

the Commission held, in effect, that the motor vehicle service proposed offered no inherent advantages over the rail service already in existence. On the other hand, the same agency, just two weeks later, in another proceeding, repeated its earlier holdings to the effect that motor vehicle service has certain inherent advantages not found in rail service. The National Transportation Policy admonishes the Commission to recognize and preserve the inherent advantages of motor carrier service. That policy is not conformed to by a refusal to authorize service which would make those inherent advantages available to shippers, on the ground that existing rail service is adequate to meet the shippers' needs.

It is submitted that the report and order of the Commission complained of herein and the decision of the District Court upholding it fail to comply with the mandate of the National Transportation Policy requiring that the inherent advantages of motor carrier service be recognized and preserved, and adequate, economical and efficient service be promoted. The question presented by this appeal is substantial and of public importance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 14th day of September, 1956, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmal postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

PETER T. BEARDSLEY

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

A. W. SCHAFFER, d/b/a SCHAFFER
TRANSPORTATION COMPANY,

and

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiffs,

vs

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil No. 624—N. D.

OPINION

Donald A. Morken, Minneapolis, Minn., (R. G. May, Sioux Falls, S. D., with him on the brief), Attorneys for Plaintiff, Schaffer.

Peter T. Beardsley, Washington, D. C., Attorney for American Trucking Associations, Inc.

H. Neil Garson and Robert W. Ginnane, Washington, D. C., Attorneys for Interstate Commerce Commission.

James E. Kilday and Edward Knuff, Washington, D. C., Stanley N. Barnes, Assistant Attorney General and Clin-

ton G. Richards, United States Attorney, with them on the brief), Attorneys for United States of America.

Robert J. Bernard, and H. F. Chapman, Sioux Falls, S. D., R. W. Cronon, Joseph Hays and Carl Helmetag, Jr., Philadelphia, Pa., James G. Lane, Amos N. Mathews and James W. Nisbet, Chicago, Ill., Attorneys for Intervening Railroads.

Before VOGEL, Circuit Judge, and MICKELSON and DEVITT, District Judges.

MICKELSON, District Judge.

This statutory three-judge court action was brought by the plaintiffs to set aside the report and order of the Interstate Commerce Commission pursuant to Sec. 205 (g) of the Interstate Commerce Act, 49 USC, Sec. 305 (g), Sec. 10, of the Administrative Procedure Act, 5 USC, Sec. 1009 and Sec. 1336, 1398, 2284, 2321 to 2325, of the Judicial Code, 28 USC, Sec. 1336, 1398, 2284 and 2321-2325, incl. That report and order was entered by the Commission in Docket No. MC-93529 (Sub. No. 2), A. W. Schaffer Extension – Granite.

The applicant, A. W. Schaffer, d/b/a Schaffer Transportation Company, sought authority to operate as a common carrier by motor vehicle in interstate or foreign commerce, over irregular routes, in the transportation of granite, manufactured and rough:

(1) From points in Grant County, South Dakota, to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota and the District of Columbia;

(2) From points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas and Louisiana.

The original hearing on the application before an examiner for the Commission was held June 13, 1952. Prior to the issuance of the examiner's recommended report and order applicant petitioned for a further hearing. By order dated September 9, 1952, the matter was reopened for further hearing, which was held on December 2, 1952, before the same examiner. Protests against the application were filed by rail carriers in New England territory on June 14, 1951; by Texas Railroad Association and Class 1 Rail Carriers in Southwestern Line Territory on June 18, 1951; and by Trunk Line Central territory railroads, except the C. & O. Ry. Co., on July 9, 1951. Wm. Dingmann, d/b/a Granite City Transfer, of St. Cloud, Minn., appeared in opposition to the application in addition to the protesting railroads. At the further hearing, in addition to the parties noted above appearing in opposition to the application, Class 1 Western Rail Carriers also intervened in opposition thereto.

On February 10, 1952, the examiner issued his report and recommended order that the authority requested by the applicant be granted.

Exceptions to the examiner's report and recommended order were filed by Class 1 Western Trunk Line Rail Carriers, by Wm. Dingmann, d/b/a Granite City Transfer, and by the eastern railroads, except the C. & O. Ry. Co.

Thereafter the Commission, Division 5, with Commissioner Elliott dissenting, issued its report and order, decided May 24, 1954, granting the authority sought by the applicant and as recommended by the examiner except that it denied the authority from Grant County, South Dakota, to points in the states of Maryland, Connecticut, Massachusetts, Vermont and the District of Columbia, because of motor carrier service then in existence furnished by Wm. Dingmann, d/b/a Granite City Transfer, the protesting motor carrier.

Following the report and order of Division 5, a petition for reconsideration, and, in the alternative, a petition for a hearing de novo, was filed by the eastern railroads. A similar pleading was filed by the Class 1 Western Trunk Line Rail Carriers.

By order entered Nov. 12, 1954, the Commission, Division 5, granted the petitions for reconsideration but denied the petitions in all other respects. The entire Commission thereafter took up the matter and on Feb. 7, 1954, entered its order with an accompanying report, denying the application. This is the report and order which is challenged by the plaintiffs herein.

On March 7, 1955, Barre Granite Assn., Jones Bros., and Rock of Ages Corporation of Barre, Vermont, filed a petition for intervention, oral argument and reconsideration. Schaffer on the same date filed a petition for oral argument and reconsideration. On March 9, 1955, plaintiff, American Trucking Assn., filed a petition for leave to intervene and for reconsideration. Replies to these petitions were filed by eastern railroads, except the C. & O. Ry. Co., and by the Class 1 Western Trunk Line Rail Carriers.

On May 16, 1955, the Commission entered an order permitting the parties seeking intervention to intervene and denying the petitions in all other respects.

On August 8, 1955, plaintiffs filed the instant complaint in this court, seeking to set aside the Commission's report and order of Feb. 7, 1954, which denied authority, and the order of May 16, 1955, which permitted the parties seeking intervention to intervene and which denied the petitions for reconsideration.

The transcript of testimony before the Commission consists of 341 pages and 24 exhibits, in addition to numerous voluminous pleadings which were filed with the Commission for its consideration.

The principal issues raised in this case are whether there is a reasonable and rational basis for the orders predicated upon the findings of the Commission and whether the Commission's actions in the premises complies with the Congressional mandate as set forth in Part 2 of the Interstate Commerce Act. (49 USC 301-327) and the National Transportation Policy, (49 USC, preceding Sec. 1).

The scope of judicial review of the decisions of independent administrative bodies, in this case the Interstate Commerce Commission, is now well settled and is no longer open to question. The rule may be stated in various ways, one of which is, that findings of fact and permissible conclusions thereon, based upon substantial evidence, are final, conclusive and binding upon the Court. I.C.C. v. Union Pacific R. R. Co., 222 U. S. 541, 547-548. In U. S. v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 536, the Supreme Court said that the function of a reviewing court " * * * is limited to ascertaining whether there is a warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law, or abuse of the Commission's discretion, a reviewing court is without authority to intervene."

In the development of the doctrine and rule of administrative finality, courts have uniformly held that it is the exclusive province and function of administrative agencies to draw legitimate inferences of fact and make findings and conclusions of fact, to appraise conflicting testimony or other evidence, to judge the credibility of witnesses and the evidence adduced by the parties, and to determine the weight of the evidence. Ill. Cent. R. R. Co. v I. C. C., 206 U. S. 441-454; I. C. C. v Union Pacific R. R. Co., supra; Alton R. R. Co v U. S., 315 U. S. 15-22. And what has just been said holds true even though the court believes that the decision of the administrative body lacks wisdom; though the court would weigh the evidence differently and

reach a different conclusion from that of the agency; or that the final decision is inconsistent with prior determinations arising under analagous or similar basic circumstances. Rochester Tele. Corp. v U. S., 307 U. S. 125, 146, at p. 139; I. C. C. v Nor. Pac. R. R. Co., 216 U. S. 538, 544; Ill. Cent. R. R. Co. v. I. C. C., supra, p. 454; U. S. v Pierce Auto Freight Lines, Inc., supra.

Sec. 10 of the Administrative Procedure Act, (5 USC, Sec. 1009) has codified the limitations of a judicial review of administrative decisions, and that act is controlling. See Riss & Co. Inc. v. U. S., 341 U. S. 907; Wong Yang Sung v. McGrath, 339 U. S. 33; Acme Fast Freight v. U. S., 116 Fed. Supp. 97.

Plaintiffs in this case mainly urge that the Commission's conclusion is not supported by substantial evidence and therefore is unsupported by the record, is arbitrary and contrary to law. They also ask this Court to consider and make findings with respect to the fact that the public is entitled to service by both forms of transportation, trucks and rail.

In final analysis the Commission was required to determine that the proposed service of applicant is or will be required by the present or future public convenience and necessity under 49 USC, 307 (a).

The extent of the Commission's authority in matters concerning the grant or denial of a certificate of public convenience and necessity has been considered in numerous judicial decisions and appears to be well settled. In an early leading case, C. & O. Ry. Co. v. U. S., 283 U. S. 35, 42, the Supreme Court said:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in

the exercise of a reasonable judgment, to determine that question."

See also T. & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 273; Colorado v. U. S., 271 U. S. 153, 168; Powell v. U. S., 300 U. S. 276, 287.

In the case of Interstate Commerce Commission v. Parker, 326 U. S., 60, 65, the Supreme Court stated:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of the government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which has been employed for similar purposes for railroads in the same Act since the Transportation Act of 1920, Section 402 (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. Case v. Los Angeles Lumber Co., 308 U. S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. C. & O. Ry. Co. v. U. S., 283 U. S. 35, 42. Cf. Gray v. Powell, 314 U. S. 402, 411-12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service would serve public convenience and necessity. Cf. Powell v. U. S., 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, Cf. McLean Trucking Co. v. U. S., 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."

Plaintiffs herein contend that the public is entitled to service by both forms of transportation, truck and rail, under a proper interpretation of the National Transportation Policy and the provisions of the Interstate Commerce Act.

As to the first contention, the Commission has spoken many times, and very recently in the case of International Transport, Inc. Extension—Tractors and Farm Machinery, No. MC 113855, and Kenosha Auto Transport Corp. Extension—Racine, Wis., No. MC 30837, Sub. 159, decided Dec. 16, 1955, and subsequent to its decision here under review. In these cases (decided together) the Commission, Division 1, said:

> "The basic issues raised by petitioners are, in substance:
>
> (1) Whether the supporting shippers who allegedly are dependent solely upon rail carriers for transportation are entitled, as a matter of law, to motor as well as rail service.
>
> (2) Whether each applicant has sustained the burden of proving that the supporting shippers are unable to obtain reasonably adequate service from the existing rail carriers and have a real need for the proposed motor service to supplement rail service."

The Commission did, in those cases, grant the authority sought, and applicant here urges these cases as authority for the contention that if the Schaffer application was before the Commission at the present time, the authority sought would be granted. We do not think these cases can be so interpreted. There the Commission said:

> "At the outset it is well to stress that the mere absence of motor carrier service is not, standing alone, sufficient justification for the granting of an application to institute such service. In numerous proceedings where a grant of motor carrier authority has been made, it has been stated that the public is entitled to both motor and rail service. However, in all such proceedings it has been found, as required by the statute, that public convenience and necessity required the proposed service, and such findings were based on all of the facts of record in each proceeding including the nonexistence of reasonably adequate motor carrier service. Any implication which might be drawn from

> the report in these proceedings that the mere absence of motor service, without more, is enough to justify a grant of motor carrier authority, is inaccurate."

The Commission there also said, in granting the authority, that the over-all rail service had been something less than reasonably adequate for the supporting shippers' needs. In the present case the full Commission found, upon the question of public convenience and necessity, that existing rail service was "reasonably adequate."

When called upon to review orders of the the Commission denying or granting certificates of convenience and necessity based on the adequacy or inadequacy of existing services, the courts have approved the test used by the Commission. Capitol Transit Co. v. U. S., 97 Fed. Supp. 614, 620; Hudson Transit Line v U. S., 82 Fed. Supp. 153, 157; McLean Trucking Co. v U. S. 63 Fed. Supp. 829, 832.

In confirming this general principle it seems quite clear that the Courts are of the same view as the Commission, namely, that the adequacy of the existing service is to be determined by weighing the needs of the shippers against the capabilities and facilities of the existing carriers without regard to whether the existing service is provided by the railroads or other motor carriers. See I. C. C. v. Parker, supra.

While in the instant case the examiner did recommend the granting of the proposed authority and Division 5 of the Commission in a three to two decision ordered the authority granted (except as to certain points hereinbefore mentioned served by Dingmann), and the full Commission in a six to four decision, with one member not participating, did upon the same record deny the authority; such is not enough for this Court to cancel and set aside the final order of the Commission. The fact that such difference of opinion existed in the minds of the examiner, the members of Division 5 and the full Commission, all experts in the

field of public transportation, serves to stress the fact that reasonable minds can and did differ upon the weight of the evidence and the conclusions to be drawn therefrom, in determining the ultimate question of the granting or refusal of the authority sought by the applicant, Schaffer.

We have carefully reviewed the evidence in this case, and without detailing it, we are unable to say that the Commission's conclusions and orders are not supported by substantial evidence, or that it acted illegally, arbitrarily or capriciously.

While we wish to note that had we been acting in place of the Commission in this case, we may have reached different conclusions, this fact will not justify our setting aside the report and orders of the Commission. I. C. C. v. Union Pacific R. R. Co., supra; Miss. Valley Barge Line Co. v. U. S., 292 U. S. 282, 287; Rochester Tele. Corp. v U. S., supra; Universal Camera Corp. v Labor Board, 340 U. S. 474, 497.

Plaintiff, American Trucking Association, particularly argues that the Commission in this case has acted contrary to and has not carried out the National Transportation Policy, (49 USC preceding Sec 1). And, further, that the Commission in recent years has changed its policy in determining public convenience and necessity. We cannot agree with either of these contentions as a matter of law. The burden of proof showing a need for the proposed service under the provisions of Sec. 207 (a) of the Interstate Commerce Act was upon the plaintiff. The Commission did not deny the application on the ground that rail service in and of itself was adequate. It purported to weigh all of the salient factors constituting proof of need for the service and in the light of the entire record found that there wasn't any need for the service which could not be handled adequately by existing carriers, both motor and rail.

The Commission is not required to set forth its findings in the terms of the provisions of the National Transportation Policy. In Luckenbach S. S. Co. v U. S., 122 Fed. Supp. 824, affirmed per curiam, 347 U. S. 984, Judge Hand, pp 827-8, said:

> "It is clear that the expressed policy must serve as a guide to the Commission in all its decisions. United States v. Great Northern R. Co., 343 U. S. 562, 576, 72 S. Ct. 985, 96 L. Ed. 1142; McLean Trucking Co. v. United States, 321 U. S. 67, 82-84, 64 S. Ct. 370, 88 L. Ed. 544. However it seems equally clear that the Commission can not and should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders. 'The basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented.' Alabama Great Southern R. Co. v. United States, 340 U. S. 216, 288; 71 S. Ct. 264, 95 L. Ed. 225. It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function. See Newtex S. S. Corp. v. United States, D. C., S. D. N. Y., 107 Fed. Supp. 388, affirmed 344, U. S. 901, 73 S. Ct. 285, 97 L. Ed. 696; Capital Transit Co. v. United States, D. C., D. C., 97 Fed. Supp. 614, 621."

While the Commission in its final report changed its mind, this does not constitute reversible error subject to review by this court. In Beard-Laney v. U. S., 83 Fed. Supp. 27, 33, affirmed 338 U. S. 803, Judge Parker said:

> "The rules to be applied in reviewing the order of the Commission are not different because that order resulted from a reversal of the prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division, which received the approval of the Commission, was the final and definitive action of the Commission, which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other

reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the fact it has arrived at a different conclusion from that which its hearing division had first expressed. Lang Transp. Co v. United States, D. C., 75 F. Supp. 915, 925."

While, as above indicated, this Court may have reached a different conclusion if it had been weighing the evidence in this case, we must and do find that the Commission acted within the scope of its authority, that it acted without abuse of its discretion, that its action was not arbitrary or capricious, and that there were adequate facts to support its findings and that its conclusions are not contrary to law.

For the reasons hereinbefore stated plaintiff's complaint will be dismissed.

March 13, 1956.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

A. W. SCHAFFER, d/b a SCHAFFER TRANSPORTATION COMPANY, and AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiffs

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Defendants.

CIVIL ACTION FILE NO. 624 N. D.

JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on January 24, 1956, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on March 13, 1956, filed herein its opinion, holding that the order of the Commission denying a certificate of public convenience and necessity to engage in interstate or foreign operations by motor vehicle on public highways is legal and valid, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief prayed for by plaintiff, be, and the same hereby is, denied, and the complaint be, and the same hereby is, dismissed.

This the 17th day of May, 1956.

CHARLES J. VOGEL
United States Circuit Judge
GEORGE T. MICKELSON
United States District Judge
EDWARD J. DEVITT
United States District Judge

Attest:

ROY B. MARKER
Clerk.

(SEAL OF COURT)

(Indorsed)—Filed May 25, 1956, Roy B. Marker, Clerk.

APPENDIX C

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Submitted May 27, 1953 Decided May 24, 1954.

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, of rough and finished granite, (1) from points in Grant County, S. Dak., to points in six states and (2) from points in Washington and Orange Counties, Vt., to points in 16 States, over irregular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

Donald A. Morken and *J. L. Hetland* for applicant.

Frank M. Coyne, R. W. Cronon, James G. Lane, and *Claude G. Metzler* for protestants and interveners in opposition to the application.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS CROSS, ELLIOTT, AND TUGGLE

BY DIVISION 5:

Exceptions were filed by certain protestants and interveners to the order recommended by the examiner, and

applicant replied. Our conclusions differ somewhat from those recommended.

By application filed May 28, 1951, as amended, A. W. Schaffer, of Revillo, S. Dak., doing business as Schaffer Transportation Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkansas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes. Wm. M. Dingmann, doing business as Granite City Transfer, hereinafter called Dingmann, class I carriers in western trunkline territory, New England territory railroads, Texas Railroad Association, and eastern railroads (except the Chesapeake & Ohio Railway), oppose the application.

Applicant holds a certificate authorizing, so far as here material, the transportation (1) of granite from points in Grant County to points in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York, and (2) of silicon carbide from Niagara Falls, N. Y., steelshot from Mansfield, Ohio, and polishing stucco from Ft. Dodge, Iowa, and Chicago Heights, Ill., to points in Grant County, over irregular routes. The purpose of the instant proposal is to enable applicant to enlarge the destination territory of his present granite operations out of Grant County and to institute a new, similar west and southbound service from Vermont origins to the 16 States named in that part of

the application. A grant of this authority would be advantageous to applicant from both an operational and financial standpoint, inasmuch as he would be able to obtain additional traffic and also better balance his overall operations. He operates 14 tractor-trailer units and one additional tractor, of which six units are used exclusively for the movement of granite. Four units generally are used in the conduct of his private operations, described below. In the event the application is granted, vehicles used in transporting shipments from Grant County to certain eastern destinations, such as Ohio, West Virginia, Maryland and the District of Columbia, would be deadheaded to the Vermont origin area under consideration to pick up west-bound traffic.

There are three granite fabricating plants in the concerned South Dakota territory, some of which have their quarries and finishing plants in separate locations. In 1951, applicant transported a total of 157 loads of granite out of this area. At present, he transports one load a week to points in New York and Pennsylvania and frequently returns with empty equipment. If the proposed service is authorized, he intends to station a dispatcher and several pieces of equipment either at Barre or Montpelier, Vt., and to perform a "shuttle" service between the described South Dakota and Vermont origins. He now offers third-day delivery from Grant County to points in Illinois, Indiana and western Ohio, and fifth-day delivery to upstate New York points. He estimates that an additional day will be required to serve the proposed New England points and from five to eight days the southern and eastern destinations involved. The delivery time from Vermont would be approximately the same as that from Grant County.

In addition to his motor carrier business, to which he devotes about 90 percent of his time, applicant also is connected with several other enterprises. He operates a

garage at Alby, S. Dak., owns a farm which from time to time is leased to others, and is a wholesale distributor of feed and other products for the Carey Salt Company. Separate books are maintained for each of these businesses. Applicant's consolidated balance sheet as of December 31, 1951, shows assets aggregating $38,414.62, of which $2,463.06 are current assets; total liabilities of $16,448.93, including current liabilities of $1,773.93; and a net worth of $21,965.69. His total net income for 1951 was $844.13. Applicant is fit and able, financially and otherwise, properly to conduct the proposed operation.

One shipper supports the authority sought in (1) of the application and two shippers, six receivers and one association support the remaining portion of the application.

The Dakota Granite Company, of Milbank, S. Dak., has two quarries in Grant County where it quarries granite which it finishes into mausoleums, monuments and building granite. These products are shipped to retail outlets by truck and by rail, principally in less-than-carload quantities. Since shipper's facilities are located about 6½ miles from a rail siding, it must use a local trucker to place tonnage at the railhead which is more expensive and inconvenient than loading directly at its plant. It now satisfactorily uses applicant's existing service two or three times a week and expresses a need for a similar service to the proposed States. If such service were made available, shipper would use it, in addition to other points, seven or eight times a year for the movement of shipments destined to the concerned New England area. At present, it has orders on file from customers in Texas, Arkansas, North Dakota, West Virginia and the New England States. All of these customers have requested delivery by motor carrier. Shipper is developing a new territory for its products in Texas and would like to have motor service available for the transportation of any

traffic that may result. In this connection, it states that it cannot, at first, expect orders large enough to require carload shipments and less-than-carload shipments might prove to be too costly for the dealer to handle initially. It estimates that in the beginning only about 24,000 pounds a year would move to that particular area. It now has a contract under which it is shipping by rail substantial quantities of granite to a project in North Dakota near the Canadian border. Motor service also has been requested for the delivery of this traffic. Shipper's customers pay the freight charges and have the privilege of requesting the carrier to be used. In most instances, they request motor service for the movement of their small shipments. The main reason its dealers at eastern points prefer motor rather than rail service is because they are able to obtain split deliveries in small quantities at a reasonable cost. Furthermore, shipments moving by motor carrier arrive at their destinations faster and usually without being damaged. From the shipper's standpoint, it is also more economical to use applicant's service rather than rail because the cost of cartage to the rail siding is eliminated and the crating of the monuments need not be so extensive. Shipper has not used the service of intervener Dingmann in the past two years primarily because of rate considerations. Moreover, it prefers to use a carrier whose equipment is stationed near its place of business. It takes Dingmann three hours from St. Cloud, Minn., to pick up a shipment after being called, whereas shipper can obtain a truck from applicant in 30 minutes.

Osborne-Peterson, Inc., of St. Paul, Minn., a retail monument dealer, fabricates and letters granite monuments and markers. It receives both rough and finished granite from Vermont exclusively by rail, mainly in carload lots, and intends to continue using that service. Less-than-carload service is used when pool-car service is

not available and there is a rush for a particular shipment. Dealer received one such shipment during the period from January 1 to June 13, 1952. That shipment which weighed 2,540 pounds, and consisted of five polished granite markers, separately crated, was shipped on April 28, and received on May 27. One of the crates was broken in transit and all the markers were damaged, thus rendering them unsuitable for the purpose for which they were ordered. As a rule, the transit time on less-than-carload traffic ranges from 3½ to 6 weeks. Dealer's interest in the proposed operation is motivated by its desire to receive less-than-carload traffic faster and in better condition than it is now arriving, especially during the two months preceding Memorial Day, which is its busiest season. Under existing conditions, a monument should be delivered at its place of business some time in March to assure Memorial Day installation. If authorized, dealer estimates it would use the proposed service six or eight times a year for the movement of either truckload or less-than-truckload shipments.

A dealer at Hutchison, Kans., retails public and private memorials to customers located generally in the southwest corner of Kansas. He purchases from 40,000 to 60,000 pounds of finished granite annually from manufacturers at Barre, Vt., which tonnagewise amounts to approximately six less-than-carload and four pool-car shipments. This traffic moves over multiple-rail lines to Kansas City, the break-bulk point, then is delivered to the consignee either by local rail or motor service. Dealer's testimony relative to the transit time involved on shipments from Vermont is conflicting, however, it appears that although over a period of time the average shipment is en route 10 days, a transit time of from 14 to 21 days is not uncommon. In recent years, dealer has experienced a little damage in using rail service, but does not consider it to be undue. He is interested in the pro-

posed operation as it will reduce the amount of crating now necessary to protect the granite, require less handling of the lading, and be faster than existing rail service. Generally, his peak period extends from March to June, with April 1 being the "cut-off" date for Memorial Day deliveries. Applicant has assured him of a 9-day service, at the most, from Barre, which would be advantageous as it would enable him to extend the deadline for deliveries by as much as two weeks, in some instances. Dealer states that speed is an essential element in the transportation of granite from Vermont and that, if authorized, he would utilize applicant's service mostly for the movement of less-than-truckload shipments involving split deliveries.

A retail monument dealer at Fremont, Nebr., receives from Vermont origins, in either pool-car or less-than-carload quanitities, six or seven shipments of finished granite a year, amounting to approximately 25,000 pounds. The proposed operation would be advantageous to him for several reasons. First, and most important, because it would be faster and more reliable than existing rail service and, thus, enable him to predict with some degree of accuracy when shipments would arrive. This is especially important during the peak season when delivery deadlines must be met and would permit him to compete more effectively with a nearby manufacturer who does his own finishing and who can, with reasonable certainty, estimate when a particular order will be ready for delivery. Additionally, he would be able to maintain a lower inventory and obtain transportation at a rate somewhat lower than that now in effect on less-than-carload shipments. He receives granite from sources in Minnesota by motor carrier and expresses a need for a similar type of service from Vermont origins.

A retail monument dealer at Moberly, Mo., receives his granite products from Barre by rail, mainly in less-than-

carload lots. The transit time in these shipments ranges from 7 to 18 days, with the average being 11.5 days. Because dealer is located on the terminal point of a railroad he considers rail service to be good. However, the proposed service would be advantageous, particularly during the peak season when expeditious service is required.

A monument dealer at Aberdeen, S. Dak., receives from 25,000 to 30,000 pounds of finished granite, except for lettering, a year from Barre. Because of the comparatively small size of his business, he is unable to stock carload quantities of monuments, and it is not practicable for him to utilize pool-car service in conjunction with the other dealers because of the great distances between dealerships. Consequently, he receives all of his freight in less-than-carload lots. These shipments arrive in about 17 days, frequently with the crates broken and, at times, with the monuments damaged. Since dealer has no facilities to repair damaged monuments, any piece of granite damaged must be reordered. The proposed service with its inherent advantages would be beneficial to his business.

A retail monument dealer at Loves Park, a suburb of Rockford, Ill., purchases about 25,000 pounds of custom-designed monuments a year from manufacturers at Barre. These monuments are ready for erection in the cemetery upon arrival, and any damage to them necessitates remanufacturing and, of course, redelivery. All of dealer's monuments move by rail, in less-than-carload lots, and are received monthly in quantities of three or less. The transit time of this traffic averages from three to five weeks. In using rail service, dealer has experienced quite some damage, consisting in some instances of monuments being marred by grease or oil, and in other instances, arriving with cracks in them. Formerly, dealer had his shipments delivered directly to his place of business, but because of delays at the railhead, he discontinued that

method of operation. He now performs that pickup and delivery service himself, receiving an allowance therefor from the railroad in those instances where the latter was to provide the transportation, and is satisfied with such arrangement. He would use the proposed service for the movement of almost all of his traffic.

Jones Brothers Company is engaged principally in the manufacture of granite monuments which are sold generally throughout the United States. So far as here material, all of its shipments originate at Barre and points within a radius of 5 miles thereof. In 1951, it shipped 1,600,000 pounds of granite to customers throughout the affected territory, of which 600,000 pounds moved in less-than-carload quantities and the remainder in either carload or pool-car shipments. Carload service has proven satisfactory, pool-car service not entirely satisfactory, and less-than-carload service unsatisfactory. The principal reason why the second-named method of transportation is not deemed adequate in all respects is because the dealer to whom the consolidated shipment is consigned is held responsible for all the freight involved, regardless of how many other dealers may be participating in the movement. Furthermore, in using this type of service, shipper must hold up its orders until sufficient tonnage is accumulated to constitute the pool car. At times, this creates a serious lull between the time the monuments are finished and the time they are shipped. Shipper is dissatisfied with the less-than-carload service because of the length of time the shipments are in transit; the damage that occasionally occurs to some of the merchandise; and the cost involved. It submitted in evidence an exhibit showing the dealers it is now supplying in the destination territory under consideration. Of the 117 named, 7 were in Minnesota, 2 in North Dakota, 6 in Montana, 9 in Colorado, 12 in Wisconsin, 31 in Illinois, 14 in Missouri, 12 in Iowa, 4 in Nebraska, 10 in Oklahoma, 3 in Arkansas,

5 in Texas, and one each in South Dakota and Louisiana. Shipper avers that many of its small dealers, due to the disadvantages connected with less-than-carload service, are changing their buying habits and purchasing granite at centers where they are able to obtain faster and cheaper motor transportation. In this respect, shipper points out that the lack of motor service is a severe handicap in competing with other producers of granite in Georgia and Minnesota which, it understands, have motor service available to the affected territory. In the event the proposed operation is not authorized, it is considering the possibility of instituting private-carrier operations for the movement of this traffic. It now uses certain motor carriers to New York and Pennsylvania destinations, but has not tendered these carriers any traffic to the considered area as it understands they do not provide such a service. It is of the opinion that, as a practical matter, a grant of the application would, in the long run, prove beneficial to the railroads because it would be able to acquire new dealers who, although at first may only buy in truckload or less-than-truckload quantities, subsequently could be built up to the point where they would require and buy in carload lots. Shipper desires motor service on a daily basis, if possible, and has no objection to the consolidation of its freight with that of other Barre manufacturers. It would not expect applicant to transport a single 1,000-pound shipment to, say, Greeley, Colo., nor does it anticipate such a situation as that to arise as applicant more than likely would have tonnage from other shippers destined to that general area. It estimates that about 3,000 pounds of granite would be tendered to applicant daily, if his service were made available. It supplies the previously mentioned dealers at St. Paul and Hutchinson and considers them to be typical customers.

Rock of Ages Corporation quarries granite and manufactures finished monuments and markers which are distributed throughout most of the United States. It has two plants in Vermont from which shipments to the proposed area are made, one at Montpelier, which is about 7 miles from Barre, and the other at Northfield, some 22 miles from Barre. At the present time, it is endeavoring to build up its distribution to all of its dealers, but particularly to those in the 16 States here involved, as they have a high agricultural population. In this regard, it has been shipper's experience that farmers provide the best market for its products. Currently, it has 168 dealers throughout the concerned destination territory to whom it ships a little over 5,000,000 pounds of finished granite a year. Of these dealers, 123 purchase in less-than-carload quantities and 45 in carload lots. Whenever possible, pool-car shipments also are made, but such service is not satisfactory because it is difficult for the dealer to whom all of the freight is consigned to pay the charge on th entire lot. Additionally, some dealers frequently have difficulty in collecting promptly from the other dealers participating in the movement, and others, find the task of unloading and reforwarding burdensome. At times, considerable rehandling of tonnage also is required in view of the fact that some dealers are not located on rail sidings. Less-than-carload service, which averages two weeks in transit and sometimes longer, is inadequate because of delays and the damage that occurs to the merchandise. During peak periods, such as Memorial Day, All Souls' Day, and Armistice Day these delays make it difficult for its dealers to meet erection deadlines. Shipper also is faced with the disadvantage of having to compete with other granite manufacturers in the south and west which have motor service available. It utilizes motor service througout New England and portions of New Jersey, Pennsylvania, and New York, but has never been abe to obtain service beyond Buffalo,

N. Y. It sells to all of the supporting dealers, except the one at Moberly. Like the previous shipper and for the same reason, it believes that the instant proposal, over a period of time, would not only aid its expansion program, but also would be helpful to the railroads from both a tonnage and revenue standpoint. Moreover, it states that there is a need for faster and more frequent service in order to give the smaller dealers who cannot now, due to the capital investment required, carry a representative group of monuments. It is of the conviction that there are excellent opportunities for expansion in such States as Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, and Minnesota and that its salesmen could successfully take advantage of these opportunities if the proposed service were made available. In the latter event, it would tender to applicant two or more truckloads, ranging from 24,000 to 30,000 pounds, each week.

The Barre Granite Association is a trade association consisting of 77 members all located in the Barre granite producing area. Of these members, 5 are carriers, 5 do custom sawing and polishing of granite and 67 are manufacturers of finished granite products. Included among the latter are the two shippers named immediately above. The function of the Association is to represent its members in traffic and shipping matters. It does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members. The latter ships to all of the States except Nevada. During the period extending from December 1, 1950, to December 1, 1951, this Association arranged for the pool-car movement of 268 cars of granite to 900 dealers in 25 States. Of this tonnage, 156 cars were consigned to dealers in the States covered by this portion of the application. The only motor service it selects is that used for local pickup-and-delivery service at each end of the movement. It favors a grant of

the proposed service and would assist its members in making use of it. It states the source of supply of granite in Vermont is limited to the Barre area in Washington County and Williamstown, Vt., in Orange County. The witness representing the association asserted that he also was authorized to represent 18 members of this association at the further hearing herein, on December 2, 1952. However, he was unable to present specific evidence relative to such matters as the tonnage each of the members ships and the particular destination points to which their traffic moves.

The Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, the Texas and New Orleans Railroad Company, the Central Vermont Railway Company, and Dingmann presented evidence in opposition to the application.

Dingmann operates as a common carrier by motor vehicle, over irregular routes, of finished monumental and structural or partially finished granite from points in Grant County to points in certain eastern and midwestern States, including Maryland, Vermont, Connecticut, Massachusetts, and the District of Columbia. He has been hauling granite since 1941, and all of his drivers are experienced in the handling of that product. He maintains headquarters about 140 miles from Grant County and operates 10 pieces of equipment which, except during the two month period preceding Decoration Day, are not fully utilized. If the need arises for more equipment, he is able and willing to supplement his fleet. He offers five-to six-day service from points in Grant County to points in the States just named, and transports about two loads of granite a month from and to these points. Until about 18 months prior to June 13, 1952, the date of the first hearing herein, he provided service, without complaint, to the eastern territory here involved which he is authorized to serve, for the supporting shipper, Dakota Granite Company. He asserts the latter company discontinued

using his service solely because it considered his rates to be too high. He desires once again to serve that shipper, stating that his service is similar to that proposed by applicant. He is apprehensive that a grant of the requested authority would deprive him of the eastbound traffic he is now transporting from Grant County.

Milbank is located on the main line of the St. Paul and Pacific Railroad from which point the latter renders direct service to Chicago where connections are made with other rail carriers for service to points and areas involved in the application. The Texas and New Orleans Railroad Company is primarily concerned with the proposed service insofar as it pertains to points in Louisiana and Texas throughout which destination area it, in conjunction with other railroads, offers service. The Central Vermont Railway Company originates granite traffic at four of its stations, namely Barre, Montpelier, Northfield, and Waterbury, Vt., and competes with the Barre and Chelsea Railroad for the outbound movement of granite from that area. All of these rail carriers are ready and able to handle the involved traffic and believe that a grant of the application would have an adverse effect on their operating revenues.

The examiner recommended that the application be granted, except that service from the requested Vermont origins should be limited to Washington and Orange counties. The following contentions of exceptants, with duplications eliminated, will be disposed of individually or collectively in the ensuing discussion, depending upon the category into which they fall.

In their exceptions, certain class I rail carriers in western trunkline territory argue that the examiner erred in giving weight to the incidental inconveniences, such as delays in transit, damage to the merchandise and lack of proper rail sidings, experienced by the supporting ship-

pers; that the latter have available rail service which is adequate generally to meet their transportation needs and support the application mainly because of their desire for lower rates; and that the recommendation of the examiner, if followed by us, would result in the loss of highly desirable traffic and in the diminution of rail revenues, both of which they can ill afford. They also argue that the examiner erred in not permitting their cross-examination of a shipper witness which allegedly would have developed that "huge trucks do more than their share of damage and pay less than their share of the cost." They maintain that such cross-examination should have been permitted since it pertains to the public interest. In the same vein, they request, in the event a need is found for the service proposed, a further hearing for the purpose of permitting them to cross-examine applicant and the shipper witnesses, among other things, on the following matters: (1) whether applicant has damaged or will damage the public highways to the extent indicated in certain issues of Readers Digest, (2) whether applicant's operations from Grant County to points in Maryland would break up the roads to the extent established in the "Maryland road tests of June, 1950" and (3) whether the supporting witnesses agree with the views expressed in another article in Readers Digest. Interveners further assail as error the admission by the examiner of certain testimony touching on the subject of rates, and cite five instances thereof. They, therefore, request that a hearing de novo be granted wherein all evidence of that nature be excluded.

As to the procedural issue raised, the examiner sustained an objection to the following question asked by counsel for interveners on cross-examination of a shipper witness "Q. Did you see this article on page 41 entitled 'Huge Trucks Do More Than Their Share of Damage, Pay Less Than Their Share of the Cost'"? Irrespective

of whether this question may relate to the public interest or not, it manifestly is beyond the scope of the direct examination and the examiner's ruling is sustained.

Concerning interveners' allegation that the examiner erred in admitting certain testimony relative to rates, the record shows that no objection was made to such testimony in three of the cited instances. Furthermore, one of the attorneys representing interveners, which now vigorously condemn the admission of such evidence, was partially responsible by his interrogation for the evidence of this type being presented. In any event, although we agree generally that testimony of this character should not be admitted in proceedings of this nature we are not persuaded that interveners were prejudiced thereby. Assuming, however, that the referred-to evidence had been excluded, the results herein would not be different. In view of the foregoing, interveners' request for a hearing de novo is hereby denied.

With respect to the request for a further hearing, the record clearly shows that the rail carriers were afforded and took advantage of the opportunity to present and develop facts pertinent to this proceeding. The described information which they seek to elicit at a further hearing, however, would be of no significant probative value nor would it change the conclusion on the ultimate issue to be determined here, namely, whether a need has been established for the proposed operation. In the circumstances, the request is denied.

In their exceptions, eastern railroads aver that (1) the examiner was unduly impressed with the fact that there is no direct motor service available to points in the destination territory sought, (2) that his summary of the evidence is neither complete or entirely correct, (3) that applicant has made no study to determine if the proposed operation would be practicable and the evidence shows it would not, (4) that the rail carriers cannot be expected

to maintain a dependable and efficient service for the transportation of all classes of commodities, in whatever quantity offered, if a carrier such as applicant is permitted to enter the field on a "hit or miss" basis in the large area involved, and (5) that although the consignees would find the proposed operation a convenience during certain periods of the year, there is no evidence that applicant would be able to furnish such a service. More specifically, protestants argue that the evidence presented at the further hearing by the witness representing the Barre Granite Association and 18 member companies was hearsay in nature, inaccurately summarized by the examiner, and used to support an erroneous conclusion. They urge that the examiner erred in overruling their objections thereto. In the alternative to a denial of the application, protestants ask for hearing de novo on the ground that applicant failed to provide proper notice to motor carriers competitive with the proposed operations as required by section 5(a) of the Administrative Procedure Act.

We agree with protestants that the evidence adduced by the witness representing the association and 18 of its members, insofar as it related to any need that the 18 members may have for the proposed operation, was largely hearsay, and of no real probative value. Although we try to avoid technicalities, especially in procedural matters, to hold otherwise in this instance would be tantamount to denying protestants the right to cross-examine adverse witnesses, which, of course, is an essential part of a full and complete hearing. However, since our findings are not predicated upon the evidence which is objected to, protestants have not been prejudiced by the examiner's rulings, which, in the circumstances, we see no reason to reverse.

Section 5(a) of the Administrative Procedure Act provides in part that "Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place,

and nature thereof." Our examination of the application indicates that in addition to numerous rail carriers, at least six motor carriers as well as various motor carrier associations were notified of this proposal. Although it is true that only one motor carrier, to a limited extent, opposes the application, in view of the testimony of the various witnesses, it is reasonably clear that there are no motor carriers operating in the considered territory which afford a service similar to that proposed by applicant. Since the application was publicized as required by law, the fact that motor carriers other than Dingmann have not sought to intervene, standing alone, is not indicative that all persons entitled to notice did not receive it. Protestants' request for hearing de novo is denied.

Dingmann's exceptions are directed to the examiner's recommendation that applicant be authorized to operate from Grant County to points in Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. He points out that the shipper at Milford is not now using his service to and from those points because of rate reconsiderations and argues that the application, to this extent, should, therefore, be denied.

In reply, applicant argues that all of the exceptions are without merit; that the examiner's findings are amply supported by the evidence; and that such findings should be sustained.

As previously indicated, the ultimate question to be resolved herein is whether a need has been established for the proposed operation. This issue cannot be answered affirmatively if both rail and motor carrier services are reasonably adequate. At this point it should be stressed that we agree with exceptants that the level of rate considerations and argues that the application, to however, that the supporting shippers, except as hereinafter noted, were motivated or influenced solely by their

desire for lower rates. While the evidence does reveal that the cost of transportation is of interest to them, their views as to the adequacy of existing service cannot be disregarded for that reason.

As seen, the shippers and receivers, other than the Dakota Granite Company, have no for-hire motor service available to them to and from the points covered by the instant application and, consequently, use rail service almost exclusively. They all agree that such service, in the main, is satisfactory for the transportation of carload shipments but entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but also and primarily from a service standpoint. In this respect, the record shows that on movements of small shipments the supporting witnesses have experienced delays, damage to their merchandise, and have been hampered to some degree by the lack or insufficiency of rail sidings. In many instances, they have been asked by customers to furnish delivery by motor carrier but because of the lack of such service they have been unable to comply with these requests. Moreover, and no less important from a business point of view, the shippers are faced with the competitive disadvantage of having to compete with producers of granite at other locations which have truck delivery available. Then, too, the lack of truck service has impeded shippers' ability to increase their sales and expand their markets in this area. By use of the proposed service, certain other benefits also would accrue to the shippers or dealers. For example, the latter would be able to maintain lower inventories, receive their freight faster and more frequently, and thus, be able better to meet erection deadlines, especially during the peak seasons. Furthermore, the amount of crating now necessary would be reduced with resultant savings in time and money. Unquestionably, some traffic would be diverted from the railroads should the application be granted in

whole or in part. However, no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers. In concluding that there is a need for the proposed service to the extent set forth in our findings, we have not overlooked the rail carriers' contention that the proposed service would not be practicable. There is nothing in the record, insofar as we can perceive, to substantiate this contention. In fact, the service proposed would tie in nicely with applicant's existing operation by providing him with return loads from Vermont origins. While his equipment would have to be deadheaded from certain eastern destinations to Vermont, the empty mileage involved would not be excessive so as to warrant the conclusion that the operation would not be feasible. Moreover, the tonnage which would be made available to applicant appears to be sufficient to enable him to provide an efficient and economical service.

The shipper at Milbank insofar as motor service is concerned, is in a somewhat better position than the other two shippers, as it has available Dingmann's service to certain of the points under consideration, namely, Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. Since the evidence shows that this shipper discontinued Dingmann's service not because his service was unsatisfactory, but solely because of rate considerations, this portion of the application will be denied.

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of rough and finished granite (1) from points in Grant County, S. Dak., to points in Wyoming, North Dakota, Texas, Arkansas, Louisiana, and West Virginia, and (2) from points in Washington and Orange Counties,

Vt., to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and with our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

COMMISSIONER ELLIOTT DISSENTS.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 24th day of May, A. D. 1954.

No. MC-93529 (Sub-No. 2)

A. W SCHAFFER EXTENSION—GRANITE

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby denied.

By the Commission, division 5.

(SEAL) GEORGE W. LAIRD
Secretary

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE

Decided February 7, 1955

Upon reconsideration, findings in prior report, decided May 24, 1954, reversed. Public convenience and necessity found not to require operation by applicant as a common carrier by motor vehicle of rough and finished granite, (1) from points in Grant County, S. Dak., to points in 10 States and the District of Columbia, and (2) from points in Vermont to points in 16 States. Application denied.

Donald A. Morken and *J. L. Hetland* for applicant.

Frank M. Coyne, R. W. Cronon, James G. Lane, Claude G. Metzler, and *J. P. Reedy* for protestants and interveners in opposition to the application.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By application filed May 28, 1951, as amended, A. W. Schaffer, of Revillo, S. Dak., doing business as Schaffer Transportation Co., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont, Texas, Arkan-

sas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes. Wm. M. Dingmann, doing business as Granite City Transfer, class I carriers in western trunkline territory, New England territory railroads, Texas Railroad Association, railroads, and eastern railroads, except the Chesapeake and Ohio Railway Company, oppose the application.

In the prior report herein, decided May 24, 1954, division 5 found that the public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of rough and finished granite, (1) from points in Grant County, S. Dak., to points in Wyoming, North Dakota, Texas, Arkansas, Louisiana, and West Virginia, and (2) from points in Washington and Orange Counties, Vt., to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, and that in all other respects the application should be denied. Thereafter, upon consideration of the record and of petitions of the opposing rail carriers, to which applicant replied, by order of November 12, 1954, division 5 reopened the proceeding for reconsideration on the present record. Subsequently, in the interest of expedition, and upon the recommendation of division 5, we assumed jurisdiction of the proceeding.

In their petition, class I western trunkline rail carriers contend (1) that the evidence fails to establish that the presently authorized transportation services are inadequate either because of lack of equipment, length of time in transit, or damage to lading; and (2) that the supporting witnesses are interested in the proposed service

merely because they feel that they will obtain motor-carrier transportation at lower rates than the existing rail rates.

The eastern railroads attack the prior report on a number of counts, some of which are repetitions in whole or in part. Among these are points which were raised in their exceptions to the report of the examiner and were considered by division 5 in the prior report.

The essence of the eastern railroads' contentions are (1) that the supporting witnesses are motivated by a desire for cheaper rates; (2) that the witnesses' expressed desire for more expedious service should be discounted because of their willingness to allow finished granite to be held for weeks and even months by Vermont producers until a sufficient quantity for a pool car can be accumulated; (3) that the witnesses' testimony is not properly summarized, as certain of them admitted they had not attempted to use existing motor service; certain of them expressed themselves as fairly well satisfied with rail service and had had very little damage on rail shipments; (4) that the testimony of the representatives of the Vermont granite producers is entitled to very little weight as their concerns do not pay the freight charges or control the considered traffic; that the representative of Rock of Ages Corporation was not sufficiently acquainted with the facts to stand cross-examination particularly with respect to his direct testimony that certain Georgia and Minnesota granite producers enjoyed motor-carrier transportation; (5) that the division obviously gave full weight to the testimony of the Vermont producers as it authorized service to points in 10 destination States from which no consignee appeared, and to 6 States from each of which only 1 consignee appeared; (6) that there are many motor carriers whose interline service has not been tried; (7) that the evidence does not establish that applicant would find it economically possible, in view of the small ship-

ments to many scattered points and the deadhead mileage involved, to render the proposed service; and (8) that a grant of the requested authority would have an adverse effect upon protestant rail lines.

In reply, applicant states that lower costs generally which can be obtained by the use of motor service with the resulting shorter holding time and time in transit, less damage, lower inventories, and less expensive crating, rather than lower rates as such, are the basis of the shippers' support. Applicant concedes that the Vermont granite producers do not pay the freight and that technically the consignees have the right to control the routing but points out that the consignees ordinarily leave the routing to the producers. Applicant asserts that the many arguments advanced and contentions made by petitioners have already been considered by division 5 in the prior report and are without merit. Applicant requests that the petitions be denied and the order of division 5 affirmed.

Applicant holds a certificate authorizing, so far as here material, the transportation (1) of granite from points in Grant County to points in Montana, Colorado, Nebraska, Kansas, Oklahoma, Missouri, Iowa, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York, and (2) of silicon carbide from Niagara Falls, N. Y., steelshot from Mansfield, Ohio, and polishing stucco from Fort Dodge, Iowa, and Chicago Heights, Ill., to points in Grant County, over irregular routes. The purpose of the instant proposal is to enable applicant to enlarge the destination territory of his present granite operations out of Grant County and to institute a new, similar west and southbound service from Vermont origins to the 16 States named in that part of the application. A grant of this authority would be advantageous to applicant from both an operational and financial standpoint, inasmuch as he would be able to obtain additional traffic

and also better balance his overall operations. He operates 14 tractor-trailer units and 1 additional tractor, of which 6 units are used exclusively for the movement of granite. Four units generally are used in the conduct of his private operations, described below. In the event the application is granted, vehicles used in transporting shipments from Grant County to certain eastern destinations, such as Ohio, West Virginia, Maryland, and the District of Columbia, would be deadheaded to the Vermont origin area under consideration, to pick up westbound traffic.

There are three granite-fabricating plants in the concerned South Dakota territory, some of which have their quarries and finishing plants in separate locations. In 1951, applicant transported a total of 157 loads of granite out of this area. At present, he transports one load a week to points in New York and Pennsylvania, and frequently returns with empty equipment. If the proposed service is authorized, he intends to station a dispatcher and several pieces of equipment either at Barre or Montpelier, Vt., and to perform a "shuttle" service between the described South Dakota and Vermont origins. He now offers third-day delivery from Grant County to points in Illinois, Indiana, and western Ohio, and fifth-day delivery to upstate New York points. He estimates that an additional day will be required to serve the proposed New England points and from 5 to 8 days the southern and eastern destinations involved. The delivery time from Vermont would be approximately the same as that from Grant County.

In addition to his motor-carrier business, to which he devotes about 90 percent of his time, applicant is also connected with several other enterprises. He operates a garage at Alby, S. Dak., owns a farm which from time to time is leased to others, and is a wholesale distributor of feed and other products for the Carey Salt Company.

Separate books are maintained for each of these businesses.

The Dakota Granite Company, of Milbank, S. Dak., has two quarries in Grant County at which granite is finished into mausoleums, monuments, and building forms. It ships to retail outlets by truck and by rail, principally in less-than-carload quantities. It uses applicant's service 2 or 3 times a week, and finds it very satisfactory. If such service were made available to the destinations here sought, this shipper would use it, in addition to other points, 7 or 8 times a year for the movement of shipments to the New England area. At the time of the hearing, it had orders to file from customers in Texas, Arkansas, North Dakota, West Virginia, and the New England States, all of which were accompanied by requests for delivery by motor carrier. It now has about 35 customers in Connecticut, of an estimated 100 dealers in that State. The shipper is developing a new territory for its products in Texas, and desires to have motor service to that State. It does not, at first, expect orders from this new territory to be large enough to justify carload shipments, and fears that less-than-carload shipments by rail might prove to be to costly for the dealer to handle initially. It estimates that in the beginning only about 24,000 pounds a year would move to that particular area. At the time of the hearing it also had in effect a contract under which it was shipping by rail substantial quantities of granite to a project in North Dakota near the Canadian border, for which motor-carrier service had been requested. Its customers pay the freight charges and have the privilege, if they desire, of designating the carrier to be used. In most instances, they request motor-carrier service for the movement of their small shipments, principally because they, particularly those at eastern points, are able to obtain split deliveries of small quantities at rates lower than less-than-carload rail rate. Furthermore, it has found that shipments

moving by motor carrier arrive at their destinations in shorter time and usually without being damaged. This shipper asserts that transportation rates play an important part in determining whether a particular transportation service can be used, especially when shipments are destined to points situated near other granite-producing areas. Also, the shipper would prefer to use applicant's service, rather than rail, because the cost of cartage to the rail siding (6½ miles distant) is eliminated, and the crating of the monuments need not be so thorough. It has not used the service of Dingmann in the past two years primarily because of rate considerations; however, it is willing to negotiate with intervener in this respect. Moreover, it prefers to use a carrier such as applicant whose equipment is stationed near its place of business; it has found that Dingmann takes 3 hours from St. Cloud, Minn., to pick up a shipment after being called, whereas it can obtain a truck from applicant in 30 minutes.

Osborne-Peterson, Inc., of St. Paul, Minn., a retail monument dealer, fabricates and letters granite monuments and markers. It receives both rough and finished granite from Barre, Vt., exclusively by rail, principally carload lots, and intends to continue using that service. Less-than-carload service is used when pool-car service is not available and there is a need for immediate movement of a particular shipment. Otherwise it directs that its shipments be held for a carload. From January 1 to June 13, 1952, it received a shipment which weighed 2,540 pounds, and consisted of 5 polished granite markers, separately crated, and which was in transit for 30 days. One of the crates was broken in transit, and all the markers were damaged to a degree rendering them unsuitable for the purpose for which they were ordered. No other complaints were specified. As a rule, the transit time on less-than-carload traffic ranges from 3½ to 6 weeks. This shipper's interest in the proposed operation

is motivated by its desire to receive small shipments more expeditiously and in better condition than at present, especially during the 2 months preceding Memorial Day, which is its busiest season. Under existing conditions, it has found that a monument should be delivered at its place of business sometime in March to assure Memorial Day installation. This shipper estimates it would use the proposed service, if authorized, 6 or 8 times a year for the movement of either truckload or less-than-truckload shipments.

A dealer at Hutchinson, Kans., retails public and private memorials to customers located generally in the southwestern section of Kansas. He purchases from 40,000 to 60,000 pounds of finished granite annually from manufacturers at Barre, Vt., which approximates 6 less-than-carload and 4 pool-car shipments. Pool-car shipments move over connecting rail lines to Kansas City where the car is broken down and from whence individual shipments are delivered to the consignee either by local rail or motor service. Although over a long period of time, the average time in transit by rail is 10 days, a transit time of from 14 to 21 days is not uncommon. In recent years, consignee has experienced some damage in using rail service, but does not consider it to be undue. He is interested in the proposed operation because it will reduce the amount of crating now necessary to protect the granite, require less handling of the lading, and be faster than existing rail service. Generally, his peak period extends from March to June, with April 1 being the deadline for Memorial Day deliveries. Applicant has assured him of a 9-day service, at the most, from Barre, which would be advantageous as it would enable him to extend the deadline for deliveries by as much as 2 weeks in some instances. However, this shipper has made no investigation to determine if any motor carriers are now available. He considers that speed is an essential element in the transportation of granite from Barre, but

does not expect the proposed service to alter his inventory situation. He would utilize applicant's proposed service principally for less-than-truckload shipments involving split deliveries, but would be willing to try other motor carriers.

A retail monument dealer at Fremont, Nebr., receives annually from Vermont origins 6 or 7 shipments of finished granite totaling about 25,000 pounds by pool-car and less-than-carload service. He considers that the proposed operation would be advantageous to him because it would be faster and more reliable than existing rail service and, thus, enable him to predict with some degree of accuracy when shipments would arrive. This is especially important during the peak season when delivery deadlines must be met. The proposed service would also permit him to compete more effectively with a nearby manufacturer who does his own finishing and thus can, with reasonable certainty, estimate when a particular order will be ready for delivery. In addition, he would be able to maintain a lower inventory and obtain transportation at a rate somewhat lower than that now in effect on less-than-carload rail shipments. He receives granite from sources in Minnesota by motor carrier and desires a similar type of service from Vermont origins. He has not investigated to determine whether any motor service is available from Vermont.

A retail monument dealer at Moberly, Mo., receives his granite products from Barre by rail; principally in less than carloads. The transit time for less-than-carload and pool-car shipments ranges from 7 to 18 days, with the average being 11.5 days. Because this dealer is located at the terminal point of a railroad, he considers rail service to be good. However, the proposed service would be advantageous, particularly during the peak season when expeditious service is required. He receives granite by motor carrier from the "northwest

and from the south" and finds such service very advantageous.

A monument dealer at Aberdeen, S. Dak., receives from 25,000 to 30,000 pounds annually of granite finished except for lettering, from Barre. Because of the comparatively small size of his business, he is unable to stock carload quantities, and it is not practicable for him to utilize pool-car service in conjunction with the other dealers because of the great distances between dealerships. Consequently, he receives all of his freight in less-than-carload lots. Shipments arrive in about 17 days, frequently with the crates broken, and at times, with the monuments damaged. As this shipper has no facilities to repair damaged monuments, any piece of granite which is damaged must be reordered. He considers that the proposed operation with the inherent advantages of motor-carrier service would be beneficial to his business, particularly where he could hold shipments to accumulate a truckload. This shipper has made no investigation of available motor carriers.

A retail monument dealer at Loves Park, a suburb of Rockford, Ill., purchases about 25,000 pounds of custom-designed monuments a year from manufacturers at Barre. These monuments are ready for erection in the cemetery upon arrival, and any damage in transit necessitates remanufacturing and, of course, reshipment. All of this dealer's monuments move by rail, in less-than-carload lots, and are received monthly in quantities of three or less. The transit time of this traffic ranges from 3 to 5 weeks. In using rail service, this dealer has experienced damage, consisting in some instances of monuments marred by grease or oil, or cracked. Formerly, he had his shipments delivered directly to his place of business, but because of delays at the railhead, he discontinued that method of operation. He now picks up his own shipments, receiving an allowance therefor from the railroad in those

instances where the latter was to provide the transportation. He is satisfied with such an arrangement, but would use the proposed service for the movement of all that traffic where delivery time is important. He has not investigated to determine whether or not other motor carriers are available.

Jones Brothers Company, of Barre, is engaged principally in the manufacture of granite monuments which are sold throughout the United States. In 1951, it shipped 1,600,000 pounds of granite to customers throughout the territory here involved, of which 600,000 pounds moved in less-than-carload quantities and the remainder in either carload or pool-car shipments. Carload service is admittedly satisfactory, but neither pool-car nor less-than-carload service is. Pool-car service is not deemed satisfactory in all respects because the first dealer to whom the consolidated shipment is consigned is held primarily responsible for all of the freight charges involved, and also the shipper must hold up delivery of orders until sufficient tonnage is accumulated to constitute the pool car. At times, this causes a long delay between the time the monuments are finished and the date shipped. This shipper is dissatisfied with less-than-carload service because of the length of transit time, the damage that occasionally occurs, and the cost involved. However, the usual transit time of less-than-carload shipments varies from 1 to 2 weeks. Of 117 dealers it presently supplies in the destination territory under consideration, 7 are in Minnesota, 2 in North Dakota, 6 in Montana, 9 in Colorado, 12 in Wisconsin, 31 in Illinois, 14 in Missouri, 12 in Iowa, 4 in Nebraska, 10 in Oklahoma, 3 in Arkansas, 5 in Texas, and 1 each in South Dakota and Louisiana. These dealers as a rule pay all the freight charges. This shipper finds that many of its small dealers, due to the disadvantages of less-than-carload service, are changing their buying habits and purchasing granite at centers where they are able to obtain faster

and cheaper motor transportation. It considers the lack of motor service a severe handicap in competing with other producers of granite in Georgia and Minnesota which, it understands, have motor service available to the destination territory here considered. In the event the proposed operation is not authorized, it is considering instituting private-carrier operations for the movement of this traffic. It now uses certain motor carriers to New York and Pennsylvania destinations, but has not tendered these carriers any traffic to points in the considered area as it understands they do not provide service thereto. It is of the opinion that a grant of the application would eventually prove beneficial even to the railroads because it would be able to acquire new dealers who, as their businesses developed, might become carload purchasers. This shipper desires motor service on a daily basis, if possible, and has no objection to the consolidation of its freight with that of other Barre manufacturers. It would not expect applicant to transport a single 1,000-pound shipment to, for example, Greeley, Colo., nor does it expect such a situation to arise as it believes applicant will have tonnage from other shippers destined to that general area. It estimates that about 3,000 pounds of granite would be tendered to applicant daily, if his services are available. It supplies the above-mentioned dealers at St. Paul and Hutchinson, and considers them to be typical customers with respect to their volume and type of business.

Rock of Ages Corporation quarries granite and manufactures finished monuments and markers which are distributed throughout most of the United States from 2 plants, 1 at Montpelier, Vt., 7 miles from Barre, and the other at Northfield, Vt., 22 miles from Barre. At the present time, it is endeavoring to build up its distribution to all of its dealers, but particularly to those in the 16 States here involved, as they have a high agricultural population. In this regard, it has been the ship-

per's experience that farmers provide the best market for its products. At present it has 168 dealers throughout the considered destination territory to whom it ships over 5,000,000 pounds of finished granite a year, exclusive of slabs and unfinished granite which move in carloads. Of these dealers, 123 purchase in less-than-carload quantities and 45 in carload lots. Whenever possible, pool-car shipments are made, but such service is not satisfactory because it is difficult for the first dealer to whom all of the freight is consigned, to pay the charge on the entire lot. In addition, some dealers have difficulty in collecting promptly from the other dealers who are consignees of the balance of the car, and others find the task of unloading and reforwarding burdensome, particularly where they are not located on rail sidings. The producer holds shipments 1 to 4 weeks to accumulate a carload. Less-than-carload service, which averages 2 weeks to transit and sometimes longer, is inadequate because of delays and damage to merchandise. Its crating of merchandise is the same for both rail and motor-carrier loading. During peak periods, such as Memorial Day, All Soul's Day, and Armistice Day delays make it difficult for its dealers to meet delivery dates. This shipper also is faced with competition from other granite manufacturers in the South and West, which, it understands, have motor service available. It utilizes motor service throughout New England and portions of New Jersey, Pennsylvania, and New York, but has never been able to obtain such service to points beyond Buffalo, N. Y. It sells to all of the supporting dealers, except the one at Moberly. It also is of the opinion that the instant proposal, over a period of time, would not only aid its own expansion program, but would also be helpful to the railroads from both a tonnage and revenue standpoint. Moreover, it contends that there is a need for faster and more frequent service in order to give the smaller dealers who cannot now, because of the capital investment re-

quired, carry in stock a representative group of monuments. It is of the opinion that there are excellent opportunities for expansion in such States as Missouri, Oklahoma, Texas, Arkansas, Nebraska, Iowa, and Minnesota, and that its salesmen could successfully take advantage of these opportunities if the proposed service were available. In the event the authority sought is granted, it would tender to applicant 2 or more truckloads of from 24,000 to 30,000 pounds, each week.

The Barre Granite Association is a trade association consisting of 77 members, all located in the Barre granite-producing area. Of its members, 5 are carriers, 5 do custom sawing and polishing of granite, and 67 are manufacturers of finished granite products. Included among the latter are the two shippers named immediately above. The function of the association is to represent its members in traffic and shipping matters. It does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members. During the period December 1, 1950, to December 1, 1951, this association arranged for the pool-car movement of 268 cars of granite to 900 dealers in 25 States. Of this tonnage, 156 cars were consigned to dealers in the States covered by this application, insofar as it proposes service from Vermont. The only motor service it selects is that used for local pickup and delivery service at each end of the movement. It favors a grant of the authority sought, and would assist its members in making use of it. It states that the source of supply of granite in Vermont is limited to the Barre area in Washington County, and Williamstown, Vt., in Orange County. The witness representing the association was also authorized to represent 18 individual members of this association for the purpose of stating that their position is the same as that set forth by the 2 preceding shippers. However, he was unable to present specific evidence concerning the tonnage each of the mem-

bers ships or the particular points to which their traffic moves.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Texas and New Orleans Railroad Company, the Central Vermont Railway, Inc., and Dingmann presented evidence in opposition to the application.

Dingmann operates as a common carrier by motor vehicle, over irregular routes, of finished monumental and structural or partially finished granite from points in Grant County to points in certain Eastern and Midwestern States, including Maryland, Vermont, Connecticut, Massachusetts, and the District of Columbia. He has been hauling granite since 1941, and all of his drivers are experienced in the handling of that product. He maintains headquarters about 140 miles from Grant County and operates 10 pieces of equipment which, except during the 2-month period preceding Decoration Day, are not fully utilized. If the need arises for more equipment, he is able and willing to supplement his fleet. He offers 5- to 6-day service from points in Grant County to points in the States just named, and transports about 2 loads of granite a month from and to these points. Until about 18 months prior to June 13, 1952, the date of the first hearing herein, he provided service, without complaint, to the eastern territory here involved which he is authorized to serve for the supporting shipper, Dakota Granite Company. He asserts the latter company discontinued using his service solely because it considered his rates to be too high. He desires once again to serve that shipper, stating that his service is similar to that proposed by applicant. He is apprehensive that a grant of the requested authority would deprive him of the eastbound traffic he is now transporting from Grant County.

Milbank is located on the main line of the Chicago, Milwaukee, St. Paul and Pacific Railroad from which

point the latter renders direct service to Chicago where connections are made with other rail carriers for service to points and areas involved in the application. The Texas and New Orleans Railroad Company is primarily concerned with the proposed service insofar as it pertains to points in Louisiana and Texas, throughout which destination area it, in connection with other railroads, offers service. The Central Vermont Railway, Inc., originates granite traffic at four of its stations, namely, Barre, Montpelier, Northfield, and Waterbury, Vt., and competes with the Barre and Chelsea Railroad Company for the outbound movement of granite from that area. All of these rail carriers are ready and able to handle the involved traffic and believe that a grant of the authority requested would detrimentally affect their revenues.

On the foregoing facts, we are unable to conclude that the public convenience and necessity require the proposed operation. It is seen that for one reason or another the supporting witnesses find fault with the presently utilized rail service. Actually, however, the evidence warrants the conclusion that the witnesses are reasonably satisfied with rail service except for the one complaint that all share, namely, that rail service is too slow. Nevertheless, it is the practice for the Vermont shippers to hold finished granite until they can accumulate a pool-car load in order that the shipments may move at the lower pool-car rate. This practice is followed with the knowledge and consent of the consignees, and the sole purpose therein is to take advantage of the lower rail rate. Less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses. The testimony of the South Dakota shipper also indicates that its support of the application is largely motivated by anticipated cheaper transportation.

We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain rates rather than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied.

All of the contentions of the parties have been considered even though not specifically discussed. In view of our conclusions herein it is unnessary to consider the question of applicant's fitness to conduct the proposed service.

Upon reconsideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

An order will be entered, vacating and setting aside the order of May 24, 1954, and denying the application.

Commissioners Cross, Arpaia, and Clarke dissent.

Commissioner Hutchinson, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX E

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 16th day of May, A. D., 1955.

No. MC 93529 (Sub-No. 2)

A. W. SCHAFFER EXTENSION—GRANITE
(Revillo, S. Dak.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Joint petition of Barre Granite Association, Jones Bros. Company, and Rock of Ages Corporation, for leave to intervene, oral argument and reconsideration, dated March 4, 1955;

(2) Petition of American Trucking Associations, Inc., for leave to intervene, reconsideration, and oral argument, dated March 4, 1955;

(3) Petition of applicant for reconsideration and oral argument, dated March 4, 1955;

(4) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition in (1) above;

(5) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition for intervention in (2) above;

(6) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated March 16, 1955, to petition for reconsideration in (2) above;

(7) Reply of Eastern Railroads (except Chesapeake and Ohio Railway Company), protestants, dated April 8, 1955;

(8) Reply of certain Class I Western Trunk Line rail carriers, protestants, dated April 7, 1955, to petition in (3) above;

It is ordered, That said petitioners, Barre Granite Association, Jones Bros. Company, Rock of Ages Corporation, and American Trucking Associations, Inc., be, and they are hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings herein;

It is further ordered, That said petitions for reconsideration and oral argument be, and they are hereby, denied, for the reason that the discussion and findings of the Commission are substantiated by the record, and are in accordance with the law applicable thereto, and neither reconsideration nor oral argument is justified.

By the Commission.

(SEAL) HAROLD D. McCOY,
Secretary

APPENDIX F

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding § 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C., § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor

vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the

transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or within any territory, as a common carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to inter-

ruptions of service over which such applicant or its predecessor in interest had no control, the Commission shall issue a certificate authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a certificate shall be lawful. Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a certificate pending the determination of such application in accordance with section 207 (a).

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, con-

tinue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C., § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

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No. 20

IN THE

Supreme Court of the United States

October Term, 1957

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the District of South Dakota, Northern Division

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IN THE

Supreme Court of the United States

October Term, 1957

No. 20

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the District of South Dakota, Northern Division

APPELLANTS' BRIEF

OPINION BELOW

The opinion of the United States District Court for the District of South Dakota, Northern Division (R. 359) is reported at 139 F. Supp. 444. The report of the Interstate Commerce Commission (R. 24) appears at 63 M.C.C. 247.

JURISDICTION

The judgment of the lower court (R. 369) was entered on May 25, 1956 (R. 373), and notice of appeal (R. 370) was filed on July 19, 1956. Probable jurisdiction was noted by this Court on December 3, 1956. (R. 372). 352 U. S. 923, 77 S. Ct. 220. Jurisdiction to review the decision on direct appeal is conferred upon this Court by Sections

1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 206 and 207 of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 306 and 307, are set forth verbatim in the Appendix hereto.

QUESTION PRESENTED

Is a motor carrier, in applying for operating authority pursuant to the provisions of Section 207 of the Interstate Commerce Act required to prove that existing *rail* service is inadequate?

Stated another way, the question may be put thusly:

Under the scheme of regulation adopted by Congress and embodied in the Interstate Commerce Act and the National Transportation Policy, are the shippers of the country entitled to service by all available forms of transport, or may the Interstate Commerce Commission determine that only the services of rail transport shall be utilized?

STATEMENT

Appellant, A. W. Schaffer, of Revillo, South Dakota, doing business as Schaffer Transportation Company, is a common carrier by motor vehicle engaged in the transportation of granite and other commodities in interstate commerce pursuant to authority granted by the appellee, Interstate Commerce Commission, under Docket No. MC-93529. (R. 1, 55-57).

By application filed May 28, 1951, as amended, Schaffer, sought from the Commission a certificate of public convenience and necessity authorizing operations, in interstate commerce, as a common carrier by motor vehicle of granite, manufactured and rough, (1) from points in Grant County, South Dakota, to points in ten

states (primarily in the East) and the District of Columbia, and (2) from points in Vermont to points in sixteen states (primarily in the Midwest), over irregular routes. (See Maps, R. 294 and 296.) After appropriate proceedings the report and order of Division 5 of the Commission, in Docket No. MC-93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, dated May 24, 1954, (R. 6), found that the public convenience and necessity required Schaffer's proposed operations substantially as requested,[1] that Schaffer was fit, willing and able properly to perform such service and to conform to the applicable laws and regulations and that a certificate authorizing such operations should be granted. (R. 23).

Following petition of numerous protestant railroads the Commission, Division 5, by order of November 12, 1954, reopened the proceeding for reconsideration on the same record. Subsequently, the entire Commission assumed jurisdiction of the proceeding. The report and order of the Commission, dated February 7, 1955, 63 M.C.C. 247, (R. 24), reversed the decision of Division 5 and stated that the record did not sustain the prior finding that public convenience and necessity required the proposed operations. The Commission, Commissioners Cross, Arpaia, Clarke and Winchell, dissenting,[1a] determined that the application should be denied, and the prior order of May 24, 1954, was vacated and set aside. (R. 37-38).

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[1] Because protestant Dingmann, a motor carrier, is authorized to transport granite from points in Grant County, S. D., to points in certain states covered by Schaffer's application, and because Dingmann's service was not shown to be unsatisfactory, Division 5 denied Schaffer's request for authority to serve points covered by Dingmann's certificate, i.e., Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. Neither of the appellants complain as to this partial denial.

[1a] The advance sheet copy of the Commission's report (R. 38) fails to show Commissioner Winchell as dissenting. This error is corrected in the bound volume, 63 M.C.C. 258.

By petition dated March 4, 1955, Schaffer requested reconsideration by, and oral argument before, the appellee Interstate Commerce Commission. By petition dated March 9, 1955, appellant, American Trucking Associations, Inc. (hereinafter called A.T.A.), a voluntary nonprofit corporation organized under the laws of the District of Columbia and the national organization of the trucking industry, requested leave to intervene, reconsideration by, and oral argument before the Commission. By order of May 16, 1955, (R. 39), the Commission granted leave to intervene to A.T.A., but denied the petitions for reconsideration and oral argument of both appellants. (R. 40).

Appellants, plaintiffs below, brought this action in the District Court to review the ruling of the Commission. The Court twice intimated in its opinion that it disagreed with the Commission's ultimate conclusion that public convenience and necessity did not require that Schaffer's application be granted, (R. 367, 368), 139 F. Supp. 450, 452; nevertheless, it found that the Commission acted within the scope of its authority, without abuse of discretion, that its action was not arbitrary or capricious, that there were adequate facts to support its findings and that its conclusions were not contrary to law, and dismissed the complaint. (R. 369). Notice of appeal (R. 370) was filed on July 19, 1956, and probable jurisdiction was noted by this Court on December 3, 1956. (R. 372), 352 U. S. 923, 77 S. Ct. 220.

SUMMARY OF ARGUMENT

For the first fifteen years of federal regulation of interstate commerce by motor vehicle, pursuant to the Motor Carrier Act of 1935,[2] the Interstate Commerce

[2] 49 Stat. 543 *et seq.*, now Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 *et seq.*

Commission consistently held that shippers were entitled to adequate service by motor vehicle as well as rail. However, commencing in 1950, the Commission made an abrupt about-face, and in several cases concluded that motor carrier authority would not be granted, where the evidence of record indicated that the existing *rail* service was adequate or "reasonably" adequate to meet the shippers' needs.

The trucking industry is seriously concerned by the Commission's departure from the healthy policy of fostering reasonable competition between the various modes of transportation subject to its jurisdiction. In order to test the validity of the Commission's newly-developed theory that existence of adequate *rail* service bars the right to institute service by motor vehicle, A.T.A. has intervened in several application proceedings before the Commission in which the Commission has adopted that theory.[3] However, in each of the cases referred to the Commission has simply decided, on the same record, that the rail service first considered adequate was, on reconsideration, inadequate to meet the shippers' needs, and therefore motor carrier authority should be granted. Thus, in none of the cases referred to has the Commission faced up to or even discussed the important policy question involved. This proceeding affords, therefore, the first opportunity, for this Court to pass on the power of the Commission to refuse to authorize the institution of motor carrier service because of the availability to the shippers, who desire and support the need for such

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[3] Docket No. MC-10900 (Sub-No. 16), *McCullough Transfer Co. —Extension—Cement in Bulk*; Docket No. MC-111472 (Sub-No. 20), *Diamond Transportation System, Inc.,—Extension—Burlington, Iowa* (harvester-thresher combines); Docket No. MC-111785 (Sub-No. 2), *Fred C. Burns Extension—Rough Lumber*; Docket No. MC-113855, *International Transport, Inc., Extension—Tractors and Farm Machinery*; Docket No. MC-29886 (Sub-No. 72), *Dallas & Mavis Forwarding Co., Inc., Ext.—Sweepers.*

service, of *rail* service which the Commission considers adequate or "reasonably" so.[4]

The importance of the question presented here to the motor carrier industry is obvious. If the Commission's construction of the law is correct, motor carriers will never get a chance to compete with the railroads in many instances, for a finding by the Commission that the existing rail service is reasonably adequate will, *ipso facto*, bar the institution of motor carrier service.

If the Commission's interpretation is upheld, certain shippers will find themselves, with only rail service to rely on, attempting to compete in common market places with other shippers which have the benefit, both rate and service-wise, of competition between the two forms of transportation. That is the situation disclosed by the record herein. The President of one of the country's larger manufacturers of granite monuments, located at Barre, Vt. (R. 222), testified that his company had lost business to competitors in Georgia and Minnesota because it did not have motor carrier service to the midwestern states involved, whereas the competitors did. (R. 230). Ironically, the witness referred to is a Director and Treasurer of the Barre and Chelsea Railroad (of which his company is part owner), which derives over 50% of its revenue from the transportation of granite. (R. 231, 239). Despite this, he supported Schaffer's application. A representative of another such manufacturer, also located at Barre, testified along similar lines. (R. 248, 250).

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[4] When the Commission first denied reconsideration in *McCullough*, complaint was filed by the applicant therein and A.T.A. in the U.S. District Court for the Northern District of Ohio (Eastern Division) to test the validity of its ruling. However, before the court case had proceeded further, the Commission reopened its docket, held further hearings and ultimately authorized three motor carriers to transport cement in bulk, the commodity involved.

Large shippers, it may be assumed, unable to secure for-hire motor carrier service, will institute their own trucking operations.[5] Thus, the Commission's denial of for-hire motor carrier authority in cases of this kind imposes the greatest burden upon the small shipper which can least afford the expense of entry into the trucking field.

As we shall demonstrate, the Commission's report on reconsideration complained of herein, dated February 7, 1955, violates the underlying purpose of the Interstate Commerce Act and contravenes the provisions of the National Transportation Policy in arbitrarily refusing to authorize the institution of the superior motor carrier service sought to be provided, and thereby promoting railroad monopoly.

ARGUMENT

Commission's Consistent Construction

From the beginning of federal regulation of motor carriers, the Commission has consistently recognized that the existence of adequate rail service affords no basis for the denial of motor carrier operating authority. In *Bowles Common Carrier Application*, 1 M.C.C. 589, 591, the Commission said:

> Interveners point out that the growth of motor-carrier transportation, and consequent diversion of traffic from the rails to the highways, has contributed to large traffic losses by rail carriers, a diminution of their revenues, and an impairment of the value of their securities. They contend that the public convenience and necessity do not require the

[5] This is often an unsatisfactory solution to the problem even for the shipper who can afford the expense of providing his own truck service. Such a shipper may, for example, much prefer to avoid the many problems connected with instituting his own truck service, such as union negotiations, payment of state registration and other highway use taxes, etc.

proposed services and that the grant of a certificate to applicant would be inconsistent with the policy of Congress declared in section 202(a) of the Act. One of the bases for this contention is that all of the origins and all of the destinations, except Elkhorn, now have adequate service by rail. We are advised by statute that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation, but we are also directed in section 202(a) to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages. There are certain inherent advantages in the transportation of petroleum products by motor vehicle. Among these are the reduction in amount of gasoline and other petroleum products which jobbers must keep on hand in storage tanks, and the elimination of the expense of trucking rail shipments of such products at destinations from tank cars to those jobbers who do not have storage faciilties adjacent to the rail carriers' tracks. *That a particular point has adequate rail service is not a sufficient reason for denial of a certificate;* shippers and consignees of petroleum products are entitled to adequate service by motor vehicle as well as by rail. (Emphasis ours.)

The principle established in the *Bowles* case was reapplied down through the years in motor freight common carrier[6] and contract carrier[7] cases.

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[6] *Maas*, 4 M.C.C. 65, 67 (livestock), *Petroleum Transit Corp. Com. Car. Application*, 3 M.C.C. 607, 609 (petroleum products), *Inter-City Trucking*, 4 M.C.C. 155, 159 (general commodities), *Jossy & Livingston*, 8 M.C.C. 143, 144 (general commodities), *L & N Moving & Storage*, 9 M.C.C. 130, 132 (new furniture), *Murphy Transfer Co.*, 9 M.C.C. 361, 363 (granite), *War Eagle Oil Co.*, 10 M.C.C. 710, 713 (petroleum), *Brooks Gillespie Motors, Inc.*, 10 M.C.C. 451, 154 (automobiles and trucks), *Heartz*, 10 M.C.C. 634, 636 (granite), *Commercial Carriers*, 12 M.C.C. 479, 484 (automobiles), *Petroleum Transit Corp. Ext.*, 11 M.C.C. 164, 166 (petroleum products), Moore, 12 M.C.C. 358, 360 (livestock), *Crossett*, 14 M.C.C. 363, 364-65 (petroleum), *Clemans*, 16 M.C.C. 235, 237-38 (general commodities), *Clark Ext.*, 16 M.C.C. 535, 539 (automobiles, trucks, etc.), *Reeser*, 16 M.C.C. 663, 666 (automobiles and trucks), *Swanson*, 17 M.C.C. 251, 252 (livestock), *Laird*

The principle of the *Boules* case was applied as well

Extension of Operations—Alturas, Calif., 18 M.C.C. 123, 130 (general commodities), *Rupp Extension—Feed and Farm Machinery*, 21 M.C.C. 9, 10 (feed and farm machinery), *Patterson Extension of Operations—Nev.—Utah*, 21 M.C.C. 261, 268 (general commodities, ore and concentrates), *Northern Truck Lines, Inc., Extension—Petroleum Products*, 22 M.C.C. 578, 580 (petroleum products), *Vance Trucking Co., Inc., Extension—Maryland*, 22 M.C.C. 750, 751 (tobacco and empty containers), *Atlantic States Motor Lines, Inc., Extension—Lyman, S.C.*, 22 M.C.C. 787, 789 (liquid caustic soda), *Philadelphia-Detroit Lines*, 23 M.C.C. 211, 216 (new automobiles), *Brady*, 23 M.C.C. 767, 778 (general commodities), *Western Auto Transports*, 26 M.C.C. 97, 99 (new automobiles), *McDowall*, 26 M.C.C. 755, 760 (automobiles and trucks), *Smith*, 27 M.C.C. 533, 535 (general commodities), *Zimmerman Contract Carrier Application*, 27 M.C.C. 650, 651 (brick and tile), *Pittman*, 27 M.C.C. 679, 682, (general commodities), *Northern Truck Lines*, 28 M.C.C. 200, 203, (petroleum), *Burlington Truckers, Inc.*, 29 M.C.C. 345, 350 (yarn and related products and supplies), *Crabb and Jespersen*, 30 M.C.C. 687, 689, aff. 42 M.C.C. 844 (petroleum products), *Newton*, 43 M.C.C. 787, 792 (frozen fruits and vegetables), *Thrun*, 46 M.C.C. 484, 487 (general commodities), *Kenosha Auto Transport Corp. Ext.—Laredo*, 49 M.C.C. 423, 425 (new motor vehicles and chassis), *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567, 571 (pipe and general commodities), *Thomas Trucking Co., Inc. Ext.—Glass*, Docket No. MC-64806 (Sub-No. 1), (Div. 5, unreported, decided October 27, 1950) 52 M.C.C. 809.

[7] *Hayden Extension of Operations*, 7 M.C.C. 671, 672, (paper products), *Meilander Contract Carrier Application*, 8 M.C.C. 230, 231 (farm machinery and fertilizer), *Columbia Terms. Co. Ext.—Roxana, Ill.—St. Louis, Mo.*, 9 M.C.C. 727, 729 (petroleum products), *Hicks Contract Carrier Application*, 9 M.C.C. 752, 754 (farm products and equipment), *Junker Contract Carrier Application*, 13 M.C.C. 603, 605 (groceries), *Reliable Van & Warehouse Co. Ext.*, 14 M.C.C. 81, 83 (explosives), *Green Contract Carrier Application*, 18 M.C.C. 91, 92 (canned goods and beer), *Marchese Contract Carrier Application*, 18 M.C.C. 359, 360 (wire and steel reinforcements), *Rainville Contract Carrier Application*, 20 M.C.C. 307, 309 (automobiles, trucks, busses), *Panek Contract Carrier Application*, 20 M.C.C. 320, 322 (petroleum products), *Rogers Cartage Co. Ext.—Mo., Ind. and Iowa*, 27 M.C.C. 276, 282 (petroleum products), *Mack's Transport Service, Inc., Ext.—Montana, Idaho*, 27 M.C.C. 367, 369 (automobiles, trucks, bodies), and *Ford Bros. Ext.—Virginia*, 47 M.C.C. 731, 735 (petroleum products).

in motor carrier passenger application proceedings.[8]

The decisions of the Commission in cases involving applications by other modes of transportation,[9] and by freight forwarders,[10] have followed the same line of reasoning, and have consistently held that the existence of adequate service by competing transportation agencies affords no basis for denial of the authority sought.

Congress' Confirmation of the Commission's Construction

Section 202(a) of the Motor Carrier Act, 1935, as originally enacted, expressed the Congressional policy

> . . . to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such

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[8] *Intermountain Transportation Co. Ext.—Bonners Ferry*, 8 M.C.C. 410, 414, 416, *Northland Greyhound Lines, Inc., Ext.*, 8 M.C.C. 612, 613, *Intermountain Transp. Co. Ext.—Great Falls—Glasgow*, 9 M.C.C. 15, 18, *Edwards Motor Transit Co., Ext.—Bradford—Buffalo*, 12 M.C.C. 502, 505, *White Circle Line Common Carrier Application*, 16 M.C.C. 516, 519, *Oregon Motor Stages Extension—Wolf Creek Highway*, 18 M.C.C. 732, 735, and *Tri-State Transit Co. Ext.—Jackson, Tenn.*, 29 M.C.C. 381, 393.

[9] *Commercial Barge Lines, Inc., Ext.—Automobiles*, 260 I.C.C. 701, 709; *Bintliff Common Carrier Application*, 260 I.C.C. 727, 732; *Canadian-Gulf Line, Ltd. Contract Carrier Application*, 260 I.C.C. 792, 795; *Pan Atlantic Steamship Corp. Ext.—Port St. Joe*, 265 I.C.C. 169, 176; *Inland Waterways Corp., Ext.—Omaha*, 265 I.C.C. 207, 208; *Norfolk, Balto. & Car. Lines, Inc., Ext.—James River*, 265 I.C.C. 247, 249; *Yankton Barge Line Com. Car. Applic.*, 265 I.C.C. 271, 276; *West Coast S.S. Co. Ext.*, 265 I.C.C. 577, 583; *Coyle Lines Inc. Ext.—Warrior River*, 265 I.C.C. 753, 757; *Seatrain Lines, Inc., Temp. Auth. App.*, 285 I.C.C. 83, 89; *Newtex S.S. Corp. Ext.—Sulphur*, 285 I.C.C. 260, 264; *Gulf Canal Lines, Inc., Ext. and Removal of Limitation*, 285 I.C.C. 291, 300; *Hay Co. Ext.—Milwaukee*, 285 I.C.C. 472, 478; *Seatrain Lines, Inc., Ext.—Savannah*, 285 I.C.C. 509, 517.

[10] *Goldberg Frt. Fwdr. App.*, 285 I.C.C. 239, 243; *Barge Service Corp. Frt. Fwdr. App.*, 285 I.C.C. 249, 252; *Lifschultz Fast Frt. Ext.—Wisc.*, 285 I.C.C. 569, 572.

> carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices: . . .

It was the quoted language which furnished the basis for the statement in the *Bowles case, supra*, that the Commission was directed "to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages," and the ultimate conclusion that shippers and consignees are entitled to adequate service by motor vehicle as well as by rail. When Congress, five years after passage of the Motor Carrier Act, by the Transportation Act of 1940, repeated the provisions of Section 202(a) and substantially reenacted them as part of the National Transportation Policy, it must be presumed to have done so with full knowledge of the Commission's construction of Section 202(a), and to have approved and confirmed such construction: *N.Y., N.H. & H.R. Co.* v. *I.C.C.*, 200 U. S. 361, 26 S. Ct. 272.

As this Court said, in *Brewster* v. *Gage*, 280 U. S. 327, 337, 50 S. Ct. 115, 117:

> The substantial re-enactment in later acts of the provision theretofore construed by the Department is persuasive evidence of legislative approval of the regulation [citing cases]. The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.

In *I.C.C.* v. *Parker*, 326 U. S. 60, 65, 65 S. Ct. 1490, 1493, this Court said:

> When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920. § 402(18) and (20), 41 Stat. 477, 49 U.S.C.A. § 1(18, 20). Such use indicated a con-

tinuation of the administrative and judicial interpretation of the language.

Departure from Commission's Policy

Recent action of the Commission in the legislative field, we submit, confirms that the present provisions of the Interstate Commerce Act governing issuance of motor carrier authority must be amended before the Commission can validly claim the power to deny motor authority on the ground that present rail service is adequate.

In its 70th Annual Report the Commission included twenty-six recommendations "of fundamental importance" for changes in the laws which it administers. (70th Annual Report, November 1, 1956, pp. 159-176). In one of its Legislative Recommendations, No. 6, the Commission proposed, among other things, that the Act be amended "to provide that additional permits may be issued [to motor contract carriers] only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

Subsequently, by letters dated February 8, 1957, addressed to the Chairmen of the Senate and House Committees on Interstate and Foreign Commerce, the Commission proposed specific legislation in the form of draft bills designed to carry out certain of its legislative recommendations, including that relating to contract carriers. Neither the draft bill nor the "justification" therefor, also included in the Commission's letters to the Chairmen of the respective Committees, contain any intimation that the Commission's reference in its Recommendation No. 6 to "existing common carriers" is intended to exclude railroads.[11]

[11] H.R. 5123 and S. 1384 (introduced February 20 and 26, 1957, respectively), proposed to include in § 209 of the Interstate Commerce Act, governing issuance of permits to motor contract carriers, the above-quoted language from the Commission's Legis-

The proposed legislation, therefore, as introduced, would have required an applicant for motor contract carrier authority to first prove that "existing common carriers are unwilling or unable to provide the type of service" which the applicant seeks to render. This is just another way of saying that if existing common carrier service (rail or motor) is not shown to be inadequate, no permit may be issued to perform motor contract carrier service. Bearing in mind that this is the very standard imposed by the Commission upon the applicant herein, despite the absence of statutory authority justifying the imposition of such a burden, it becomes clear that the specific amendment proposed by the Commission is, in effect, an admission that the law does not presently countenance the denial of motor carrier operating authority on the ground that existing rail service has not been shown to be inadequate. And if the Commission should argue that adequate rail service presently bars the institution of motor common carrier, but not motor contract carrier, service we need only point out that the Commission has denied applications by both motor common and contract [12] carriers because of failure to prove inadequacy of rail service. In addition, the present language of the relevant provisions of the Act relating to grants of authority to motor common and con-

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lative Recommendation No. 6. However, as reported by the Senate and House Committees on Interstate and Foreign Commerce, this language was stricken from the bills. S. Rept. No. 703, July 24, 1957; H. Rept. No. 970, August 2, 1957. The Senate report, in commenting on this (p. 4), states: "However, the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 would provide too rigid a pattern. It decided that the proposed requirements in section 209(b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required types of service should be withdrawn."

[12] The *Diamond* case, *supra*, p. 5 (footnote 3) involved an application to perform contract carrier service.

tract carriers (§§ 207(a) and 209(b)) afford no contrast which would justify the Commission in considering the existence of adequate *rail* service as a bar to the institution of one type of motor carrier service but not the other.

Although for the first fifteen years of regulation the Commission, in a multitude of cases, consistently took the position that the adequacy of an existing type of transportation service afforded no basis for denial of an application to render a different and competing type of transportation service,[13] the 1950 report of Division 5 of the Commission in *Kenosha Auto Transport Corp., Extension*, 52 M.C.C. 123, 126 states:

> We are aware that in connection with numerous applications for authority to operate as a motor carrier in interstate or foreign commerce, it has been found that a shipper is entitled to both motor and rail service. But in so finding, the basic issue has always been whether the public convenience and necessity require a proposed operation. We do not, however, believe that, as a matter of law, a finding of public convenience and necessity must necessarily follow a showing that there is no existing motor service. Rather, the issue of public convenience and necessity is a question of fact which depends, among other things, on whether existing service is or is not adequate.

In *Hayes Freight Lines, Inc., Extension—Ball Clay*, 52 M.C.C. 303, also decided in 1950, the Commission denied motor carrier authority on the ground, among others,

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[13] In *Coastal Tank Lines, Inc., Ext.—Steubenville, Ohio*, 47 M.C.C. 520, 524, the opinion of the full Commission (Commrs. Lee, Splawn and Mitchell, dissenting) states: ". . . we have found that the public is entitled to both rail and motor-carrier service, *where, as here, the evidence establishes a need for both services.*" We respectfully suggest that the cited language does not accurately summarize the previous decisions referred to, in that they unequivocably held that shippers were entitled to adequate service by motor as well as rail. Thus the language we have emphasized misstates the rationale of the decisions prior to 1950.

that there was "no proof that the present rail service . . . is in any manner inadequate," a complete about-face from its earlier decisions holding that the existence of adequate rail service furnishes no basis for denial of motor-carrier authority.

We respectfully submit that the decisions in the *Kenosha* and *Hayes* cases, and the report and order complained of herein, contravene the National Transportation Policy. Analysis of the provisions of that Policy reveals no justification for the promotion or maintenance of a monopoly in favor of any form of transportation.

It is *not* the position of appellants, that the Commission must grant motor-carrier authority whenever the record in an application case clearly shows or reasonably suggests the absence of existing motor-carrier service. We recognize, of course, that such a showing, without more, does not satisfy the statutory requirement of public convenience and necessity.

The applicant in any event must sustain the burden of proving that its services are required by the public convenience and necessity, through the degree of proof that it must present will vary from case to case depending on a number of factors, and in fact, will be less substantial in those instances in which the shippers are not presently served by other motor carriers.

What appellants do say is that motor-carrier applicants may not be required, as a part of their burden of proof, to show the inadequacy of existing rail service, because, in any event, its adequacy is insufficient reason for denying a motor-carrier application. And this is what we believe the many Commission citations referred to meant in holding that shippers must be afforded adequate service by motor-vehicle, as well as by rail. Perhaps the following language from *Crabb and Jespersen Common Carrier Application*, 30 M.C.C. 687, 689, makes the point as well as it can be made:

Protestants include in their petition a tabulation of the number of cars of petroleum products transported by them, and the revenue derived therefrom, as an indication of the importance of this traffic and the severe hardship that would result from its loss. It is contended that the territory in question should not have both rail and motor-carrier service, and that it is for this Commission to determine which of these alternate services will best serve the present and future public convenience and necessity. Such a contention cannot be sustained.

The purpose of the act clearly contemplates the existence of transportation by highway as well as by rail. We have uniformly held, in numerous applications by motor carriers for authority to establish service which would be competitive with rail service, that the shipping public is normally entitled to an adequate system of transportation by motor vehicle as well as by rail. In the instant case, when the rails are used, it is necessary to purchase in large quantities, which is an inconvenience to consignees. Furthermore, many of the consignees are not located on railroad sidings. We are convinced, on reconsideration, that the record warrants a grant of authority to applicants to serve a limited territory in South Dakota, and that the public should have available to it both rail and motor-carrier service.

Maintenance of Competition

The Commission has consistently recognized that the Interstate Commerce Act requires the maintenance of reasonable competition. In one of the earliest cases decided, *Re Southern Railway & Steamship Asso.*, 1 I.C.C. 278, 287, the opinion written by Chairman Cooley states:

> In thus deliberately making provision for competition, . . . Congress must be supposed to have done so because the public interest required it. That competition is the life of trade is one of the most generally accepted of maxims; among its principal benefits is the protection it gives against extortionate charges.

And in *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 208, the Commission said:

> Nor are we impressed with the idea that a monopoly of motor bus transportation in a section of the country such as this is necessarily desirable. Public regulation can enforce what may be called reasonable standards of safe, continuous, and adequate service, but it can hardly be expected to take the initiative in experimentation and the development of new types of service. In fact the carriers would probably resist regulation in the courts, if it did undertake to follow such a line, on the ground that it was an invasion of managerial prerogatives and discretion. Competition is the best-known spur to such an endeavor and we are not persuaded that Congress intended to eliminate it in the motor bus field any more than in the railroad field.

In a very recent decision, *Herrin Transp. Co. Ext.—Jacksonville*, the Commission, division 1, authorized the institution of a new motor carrier service between New Orleans and Jacksonville, over the protest of numerous motor carriers. The report in that case, dated February 14, 1957, 69 M.C.C. 629, 638, reiterates the desirability of competition in transportation:

> . . . reasonable competition is in the public interest and should stimulate service and increase commercial intercourse between the areas involved. In addition it should serve as a deterent to future deteriorations in service which are contrary to the public interest. Both the courts and the Commission have long recognized that reasonable competition should be encouraged, and that regulated monopoly, in most instances, is not a substitute therefor.

The desirability of competition between the different modes of transportation has been clearly established. In *Naval Stores From Mississippi to Gulf Ports*, 235 I.C.C. 723, 733, the Commission said:

> Healthy competition between different agencies of transportation is undoubtedly in the public interest.

This Court has pointed out that it is the duty of the Commission to guard against monopolies in transportation. In *Interstate Commerce Commission* v. *Parker*, *supra*, at 326 U. S. 73, 65 S. Ct. 1497, in which the Court upheld the authority of the Commission to issue certificates of convenience and necessity to a railroad motor carrier subsidiary, it is stated:

> Protestants, the appellee motor carriers, point out that under this interpretation in every case of an application by a rail carrier or its wholly owned subsidiary, for a certificate of convenience and necessity to operate a motor line to render service at way-stations, the Commission will have power, under facts and with limitations in the certificate, previously described, to grant the certificate. This is true. It must be expected, however, that the Commission will be as alert to perform its duty in protecting the public in the maintenance of an efficient motor transportation system as it is in protecting the same public in the successful operation of its rail system. *The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly. * * * It has the duty to preserve the inherent advantages of each mode of transportation.* (Emphasis ours).

In its second report on reconsideration in *Metler Ext.—Crude Sulphur*, 62 M.C.C. 143, 148, the report of the Commission states:

> Usually it is desirable from the viewpoint of the shipper and in the public interest that competition within reason be encouraged and that there be available to shippers competing modes of transportation, even competing carriers in the same field, but if sound economic conditions in transportation are to be fostered, the advantages of competition must in some instances yield to the needs of the existing carrier or carriers, depending upon the amount of the available traffic and the comparative adequacy of the existing services. * * *

We agree, of course, that there are many instances in which the existing service (whether rail, motor or water) may be entirely adequate to fully satisfy a shipper's requirements for *that particular form of transport.* But the Commission goes further and now espouses the idea that certain shippers and receivers, not presently able to secure motor service, must be forever relegated to the use of rail service only, even though it may be reasonably adequate, while their competitors are able to enjoy the benefits of motor carrier service.

The Senate Select Committee on Small Business late in 1955 addressed an inquiry to the Interstate Commerce Commission, setting forth various questions respecting the several provisions of the Interstate Commerce Act and the National Transportation Policy, and the Commission's administration thereof. On November 28, 1955, the Commission responded to the inquiry. One of the questions (No. 12) posed by the Committee was:

> Why and to what extent should freedom of entry into the trucking business be curtailed? What are the dangers, if any, of unrestricted competition?

A portion of the Commission's answer, quoted next, appears of special significance herein:

> Restrictions upon entry into the trucking business should be imposed only in the interest of the public, not in the interest of existing carriers, although they may incidently [sic] benefit therefrom. Curtailment of entries for the purpose of limiting competition often is warranted as a means of developing a financially responsible and reliable transportation industry. *Competition, however, should be fostered except in circumstances where to dilute the available traffic would result in instability and inefficient service.* (Emphasis ours). "ICC Administration of the Motor Carrier Act", Hearings before the Select Committee on Small Business, United States Senate, 84th Cong., 1st Sess., Nov. 30, Dec. 1 & 2, 1955, p. 326.

In this connection it is interesting to note the comment of the Commission, Division 4, in Docket No. MC-F-5845, *Wells—Purchase—Maddux*, decided December 14, 1955. To the contention of certain motor carrier protestants that approval of the proposed purchase would injure them competitively, the report (Sh. 11) replies:

> The annual gross operating revenues of Northern and Ringsby [protestants] runs into the millions and it seems apparent that any traffic which they may lose as a result of the instant transaction would not prevent them from performing an adequate service to the shipping public under their authorities.

The annual gross operating revenues of the railroad protestants which introduced evidence in this proceeding before the Commission runs not into the millions—but the hundreds of millions[14]—and, *a fortiori*, a grant of the authority sought by Schaffer could not, in the Commission's words, prevent them from performing an adequate service to the shipping public. If, then, as the Commission told the Senate Committee, competition should be fostered "except in circumstances where to dilute the available traffic would result in instability and inefficient service," one is constrained to wonder why the Commission felt these railroad giants needed to be protected from the competition of a relatively insignificant operator such as Schaffer. Undoubtedly, the Com-

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[14] The gross operating revenues of the three railroads referred to at page 256 (R. 36) of the Commission's report, for the year 1954, amounted to more than one-third of a *billion* dollars. The figures listed individually are as follows:

Carrier	*1954 Gross Operating Revenue*
Chicago, Milwaukee, St. Paul & Pacific	$237,745,000
Texas & New Orleans	127,350,000
Central Vermont	10,756,000

SOURCE: C.M. St. P. & P. figure from I.C.C. Bureau of Transport Economics and Statistics Statement No. M-150, December, 1954. Figures for other two roads taken from annual reports filed with I.C.C.

mission will argue that the application was properly denied because, as stated at 63 M.C.C. 257 (R. 37), the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. We next deal with this contention.

Basis for Shipper Support of Application

The railroad protestants before the Commission argued that Schaffer's application should be denied because the purpose of the supporting shippers was to secure lower rates, rather than improved service. (R.26). The report of Division 5 met this contention head-on (R. 21) as follows:

> At this point it should be stressed that we agree with exceptants that the level of rates as such is not in issue. We do not agree with them however, that the supporting shippers, except as hereinafter noted, were motivated or influenced solely by their desire for lower rates. While the evidence does reveal that the cost of transportation is of interest to them, their views as to the adequacy of existing service cannot be disregarded for that reason.

The Division's report then goes on to state (R. 21-22) that the record before the Commission shows:

> (1) That rail service on small shipments has resulted in delay and damage;
>
> (2) That the lack or insufficiency of rail sidings has hampered shippers and receivers of granite;
>
> (3) That shippers have been unable to comply with customer requests for truck service in many instances;
>
> (4) That shippers are faced with the disadvantage of having to compete with producers of granite at other locations which have truck service available;
>
> (5) That the lack of truck service has impeded the shippers' ability to increase sales and expand service;
>
> (6) That the lack of truck service prevents deal-

ers from being able to maintain lower inventories, receive their shipments faster and more often, and meet erection deadlines, especially during peak seasons; and

(7) That the lack of truck service results in more crating than would otherwise be necessary, with resulting loss of both time and money.

The Commission's report on reconsideration nowhere indicates that the Division erred in making the findings quoted above. Nevertheless, it concludes, at 63 M.C.C. 257 (R. 37), "that the [rail] service presently available is reasonably adequate," and that the "witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service."

Nothing more need be said respecting the fundamental error of the Commission's holding that if rail service is "reasonably adequate" motor service should not be authorized. We pass then to consideration of its finding that the witnesses' main purpose in supporting the application is to obtain lower rates. This finding, and the conclusion reached therefrom that "this is not a proper basis for a grant of authority and the application, therefore, must be denied", 63 M.C.C. 257 (R. 37), are both untenable.

The Commission has a mandate, by virtue of the National Transportation Policy, to promote "adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *." It ignored this mandate when it completely disregarded the seven compelling reasons set forth by Division 5 as justifying a grant of authority, and apparently substituted its desire to protect railroad revenues from motor carrier competition for the Congressional admonition referred to. The Commission's conclusion that the shippers supported the application to secure lower rates is not supported by the record. It is true that the record shows that some shippers accu-

mulate pool-car shipments, rather than rely on rail l-c-l service, for two reasons. One reason, cited at 63 M.C.C. 257 (R. 37), is to take advantage of the lower rate for carload shipments. But an equally compelling reason, noted at 63 M.C.C. 255 (R. 34), is that less-carload service is inadequate because of delays and damage to merchandise. The Commission's statement, 63 M.C.C. 257 (R. 37), that the record warrants the conclusion that the only real fault with rail service is that it is too slow, seems to be based on facts not of record. The positive testimony of the shipper witnesses respecting the many unsatisfactory aspects of rail service was not refuted of record by the rail protestants.

The record nowhere indicates that the supporting shippers desire lower rates, as such, as distinguished from cheaper and more adequate transportation service by virtue of lower truckload minimum weights, shipper to dealer movements without intervening loading and unloading, and split delivery service afforded by motor carriers. The Commission's statement that it is well established that a desire for lower rates is not a proper basis for a grant of authority is based on cases wherein the record showed that the applicant's supporting shipper witnesses had available the services of protesting motor carriers, which had not been shown to be inadequate, which is decidedly not the situation here. Thus the general rule cited by the Commission (and with which we do not quarrel) is completely beside the point since it cannot validly be applied herein.

The District Court's Fundamental Error

The court below, while noting that "had we been acting in place of the Commission in this case, we may have reached different conclusions . . ." 139 F. Supp. 450 (R. 367), nevertheless felt constrained to uphold the Commission's report and order. In so doing the court said, 139 F. Supp. 451 (R. 367):

> The burden of proof showing a need for the proposed service under the provisions of Sec. 207(a) of the Interstate Commerce Act was upon the plaintiff. The Commission did not deny the application on the ground that rail service in and of itself was adequate. It purported to weigh all of the salient factors constituting proof of need for the service and in the light of the entire record found that there wasn't any need for the service which could not be handled adequately by existing carriers, both motor and rail.

The above portion of the District Court's opinion, we respectfully submit, discloses its fundamental error in upholding the Commission's report and order.

First off, we believe a fair reading of the Commission's report cannot fail to convince that the *primary*, if not the sole, basis for denial of Schaffer's application, was its finding "that the service presently available is reasonably adequate." 63 M.C.C. 257 (R. 37). To be sure, the report, in the same paragraph, goes on to state that "the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service." It is this latter finding, we assume, which prompted the court to say that the Commission "purported to weigh all the salient factors" in reaching its decision. Although it is obviously impossible to determine arithmetically, or on any other basis, what portion of the Commission's denial of Schaffer's application can be allocated to its finding "that the service presently available is reasonably adequate," it can hardly be denied that that finding was a very important consideration in refusing to allow Schaffer to institute the motor-carrier service sought to be performed. This being so, it necessarily follows that the Commission's decision must be set aside unless this Court is willing to say that the existence of adequate rail service is sufficient ground for denial of an application to provide motor carrier service.

Second, while the Commission's report, in holding that "existing service is reasonably adequate" was less spe-

cific than it should have been, it is clear that the "existing service" referred to was the service of the protestant railroads. Thus the Court's summarization of the Commission's decision, in stating that the Commission found no need for service "which could not be handled adequately by existing carriers, both motor and rail," is in error. Bearing in mind that a portion of the authority applied for by Schaffer had previously been denied by the Commission's division 5 to the extent that it would duplicate that held by Dingmann, the sole motor carrier protestant, as to which partial denial no exception was taken, it will be seen that as to the remainder of the authority sought, there is in reality no existing motor carrier service at all. Thus it is clear that the Commission's reference to "existing service" must be read as "existing rail service" and not, as the court below put it, "both motor and rail."

Preservation of Inherent Advantages of Motor Carrier Service

In motor carrier application proceedings such as this, the railroad protestants invariably ask the Commission to hold that their service is adequate to meet the shipper needs. To put it another way, they ask the Commission to find that the motor service proposed is not sufficiently superior to the existing rail service to justify the grant of authority sought. However, when these same railroads seek to reduce their rates below those of their motor competitors, they are the first to allege that motor carriers have certain inherent advantages which, they claim, require the proposed reduced rail rates. As the Commission observed in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 488, "The effect of the relative advantages and disadvantages of rail versus other modes of transportation is the controlling factor in attempts by the carriers to make their rates according to competitive necessity. Where regular and de-

pendable motor common carrier service is available, its completeness, expedition and flexibility unquestionably give it a certain advantage over rail service." See also, *Alcoholic Liquors in Official Territory*, 283 I.C.C. 219, 227.

The Commission has on numerous other occasions noted that motor carrier service has certain inherent advantages over rail service. In one of these cases, *Canned Goods in Official Territory*, 294 I.C.C. 371, 379 the report of the Commission states:

> There are inherent advantages of motor transportation which have no counterpart in rail service. It is individualized, expedited, and more flexible than rail transportation.

The trucking industry is somewhat confused—we think justifiably—to find that in rate proceedings much stress is laid upon the inherent advantages of motor carrier service, only to find, in application cases, that these same advantages have apparently vanished into thin air.

One thing, however, is certain. The Commission is bound by the National Transportation Policy to preserve the inherent advantages of motor carrier service. Such advantages can hardly be preserved by a refusal to authorize service which would make them available to shippers. Despite this, the decision herein indicates abandonment by the Commission of the salutary principle that shippers are entitled to adequate service by motor vehicle, as well as rail.

Right of Existing Carriers to Transport Available Traffic

The Commission can be expected to defend its report and order complained of herein on the ground that it consistently has held in motor carrier application proceedings that existing carriers should be permitted to handle all available traffic without the intrusion of a new competitor. However, from the inception of regu-

lation pursuant to the provisions of the Motor Carrier Act of 1935, the Commission has invoked this principle only to avoid an excess of intra-agency competition, never to exclude inter-agency competition. In *C & D Oil Co. Contract Carrier Application*, 1 M.C.C. 329, 332, the Commission stated:

> . . . To foster sound economic conditions *in the motor industry*, existing *motor carriers* should normally be accorded the right to transport all traffic which they can handle adequately, efficiently and economically in the territories served by them, . . . [Emphasis added].

The *C & D* case became the leading case on this point and was cited with approval or actually quoted in some fifty reported Commission decisions.[15]

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[15] *Clark*, 1 M.C.C. 445, 448; *Wellspeak*, 1 M.C.C. 712, 715; *Smith*, 1 M.C.C. 717, 719; *Empire Petrol & Transport Co., Inc.*, 2 M.C.C. 12, 13; *Coomes*, 2 M.C.C. 52, 54; *Carr*, 2 M.C.C. 263, 269; *Vitullo*, 2 M.C.C. 413, 414; *Walton*, 2 M.C.C. 474, 476; *Justice*, 2 M.C.C. 699, 700; *Marini*, 2 M.C.C. 727, 728; *Morgangey*, 3 M.C.C. 26, 28; *Harrison & Harrison*, 3 M.C.C. 76, 78; *Myers Trucking Co.*, 3 M.C.C. 273, 275; *Nelson Bros. Oil Co.*, 3 M.C.C. 367, 368; *Smith*, 3 M.C.C. 747, 748; *Bourn*, 3 M.C.C. 765, 766; *Vigeant*, 3 M.C.C. 797, 799; *Monell*, 4 M.C.C. 28, 30; *Kuczinski*, 4 M.C.C. 45, 46; *Lake Champlain Transport Lines*, 4 M.C.C. 125, 128; *Castranova*, 6 M.C.C. 769, 770; *Eastern Shore Oil Co.*, 7 M.C.C. 173, 176; *Waldorf Distributing Co.*, 8 M.C.C. 543, 545; *Augilera*, 9 M.C.C. 34, 35; *Stegall*, 9 M.C.C. 475, 476; *D'Agata*, 10 M.C.C. 149, 150; *Woodlief*, 10 M.C.C. 91, 95; *Panacek*, 10 M.C.C. 677, 678; *Taylor*, 11 M.C.C. 155, 156; *Scott Ext. of Operations*, 11 M.C.C. 227, 228; *Pack Ext. of Operations*, 14 M.C.C. 31, 32; *Shelly*, 14 M.C.C. 272, 274; *La Faver*, 14 M.C.C. 309, 311; *J. J. Hoy, Jr., Ext.—N.Y., N.J., and Conn.*, 14 M.C.C. 797, 800; *Foreman*, 16 M.C.C. 467; *Hypes Ext.—Ill., Southern Iowa*, 16 M.C.C. 543, 544; *Bussman and Merritt*, 16 M.C.C. 577, 578; *McNutt Ext. of Operations—Davenport*, 16 M.C.C. 590, 592; *Foote & Hynes Trucking Co., Inc.*, 18 M.C.C. 161, 162; *Burwen*, 19 M.C.C. 644, 646; *Provan*, 19 M.C.C. 682, 684; *Riddle*, 20 M.C.C. 143, 144; *Zechman Ext. of Operations—Brick*, 21 M.C.C. 247, 250; *Gabler*, 21 M.C.C. 713; *Fields Ext. of Operations—Charlottesville*, 21 M.C.C. 788, 789; *Daum Ext. of Operations—Ill.*, 22 M.C.C. 366, 367; *Brown Ext. of Operations—Oleomarga-*

It is evident from the language of the *C & D* case and of the cases following it that the concern of the Commission in excluding competition was with the welfare of the existing *motor* carriers. To be sure, in some of the cases railroads as well as motor carriers were rendering the existing service which the Commission sought to protect. For example, in *Lake Champlain Transp. Lines Contract Carrier Application*, 4 M.C.C. 125, 128, the Commission said:

> Protestants' evidence indicates that, in addition to applicants' service, there are available to the shippers of granite, marble and slate from and to the considered territories the service of numerous motor and rail carriers. There is no showing that such carriers cannot handle all available traffic adequately, efficiently, and economically, or that there is any public need for additional service.

Similar references to transportation by established carriers by rail *and* motor vehicle appears in *Smith Contract Carrier Application*, 1 M.C.C. 717, 719. Nevertheless it was the economic condition of the existing motor carriers with which the Commission was concerned, and not that of the rail carriers. Thus in *Justice Common Carrier Application*, 2 M.C.C. 699, 700, though there were rail protestants, the Commission said, ". . . there are a large number of motor carriers operating in this territory. Ordinarily these carriers should be accorded the right to transport all the traffic that they can handle adequately, economically, and efficiently." Similar expressions can be found in *Brundage Common Carrier Application*, 11 M.C.C. 187, 190; *Rabinowitz Common Carrier Application*, 4 M.C.C. 587, 588; *Georgia Motor Express Inc., Common Carrier Application*, 10 M.C.C. 159, 164;

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rine, 24 M.C.C. 315, 317; *Rock*, 24 M.C.C. 348, 350; *Kirk*, 24 M.C.C. 431, 432; *McCoy Truck Lines, Inc., Ext.—Cedar Falls—Fort Dodge*, 26 M.C.C. 585, 589; *Jorgensen Ext., of Operations—Illinois*, 30 M.C.C. 459, 461.

and *Pine Tree Transp., Inc., Ext.—Frozen and Canned Fruits*, 54 M.C.C. 667, 675; and in numerous other Commission proceedings.[16]

That the Commission has invoked this principle in motor-carrier application proceedings only for the pro-

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[16] *Reymers, Ext.—Klamath Falls, Etc.*, 11 M.C.C. 434, 436; *J. W. Dresher Co., Inc.*, 12 M.C.C. 63, 66; *Lehr Ext. of Operations—Glass*, 13 M.C.C. 777, 778; *Cox*, 14 M.C.C. 777, 779; *Carpenter*, 17 M.C.C. 693, 697; *Pregler Ext. of Operations*, 18 M.C.C. 257, 259; *Hansen*, 18 M.C.C. 655, 656; *Burwen*, 19 M.C.C. 644, 645; *Lemon*, 20 M.C.C. 209, 210; *Kessell Ext. of Operations*, 20 M.C.C. 653, 654; *Pelicano*, 21 M.C.C. 203, 205; *Kundel*, 21 M.C.C. 414, 416; *E. F. Enoch, Inc.*, 22 M.C.C. 510, 513; *Smith Ext. of Operations—Iowa and Ill.*, 23 M.C.C. 128, 130; *Sunrise Trail, Inc., Ext.—Spokane, Wash.*, 23 M.C.C. 267, 270; *Murphy Ext. of Operations—Wool Oil Softener*, 23 M.C.C. 309, 312; *Ingham Brokerage, Inc., Ext.—New Commodities*, 23 M.C.C. 175, 177; *Ferreira*, 26 M.C.C. 385, 387; *McClendon, Ext. of Operations—Chattanooga, Tenn.*, 26 M.C.C. 590, 592; *Eastern Exp. & Haulage, Inc., Ext.—Port Chester, N.Y.*, 26 M.C.C. 657, 659; *Seal*, 26 M.C.C. 685, 688; *Motor Haulaway Co.*, 27 M.C.C. 19, 25; *Tom Still Transfer Co., Inc.*, 27 M.C.C. 42, 44; *Lee and Eastes Ext. of Operations—Yakima, Wash.*, 27 M.C.C. 653, 659; *Miller Ext. of Operations—Vernon—Memphis, Texas*, 27 M.C.C. 731, 735; *Inland Motor Freight Ext.—Milton, Oreg.*, 27 M.C.C. 784, 787; *Glupker, Ext.—Ind., Ill., and Ohio*, 29 M.C.C. 723, 728; *Keele*, 30 M.C.C. 173, 181; *English Ext. of Operations—New Orleans*, 31 M.C.C. 435, 441; *Deaton Truck Lines, Inc.*, 32 M.C.C. 89, 100; *Whisenant*, 32 M.C.C. 239, 243; *West Coast Bus Lines*, 32 M.C.C. 619, 633; *H. & B. Trucking Co., Inc.*, 33 M.C.C. 211, 215; *Holland Transp. Co., Inc., Ext.—Mass.*, 33 M.C.C. 558, 560; *Thompson Ext. of Operations*, 34 M.C.C. 5, 13; *Bass Bondeil Trucks, Inc.*, 34 M.C.C. 39, 44; *Bisceglia*, 34 M.C.C. 233, 240; *Stucki and Wittwer*, 34 M.C.C. 756, 759; *Contract Carriers, Inc.*, 41 M.C.C. 165, 170; *Clark-Callahan, Inc.*, 41 M.C.C. 693, 706; *Santa Fe Trail Transp. Co. Ext.—Joplin*, 41 M.C.C. 713, 715; *Maner*, 42 M.C.C. 778, 787; *Major*, 43 M.C.C. 795, 799; *Sanders Ext. of Operations—Washington, D.C.*, 47 M.C.C. 210, 214; *Robinson*, 47 M.C.C. 347, 352; *M & H Transport Service Co. Ext.—Willow Run*, 47 M.C.C. 409, 412; *Squaw Transit Co.*, 48 M.C.C. 17, 22; *Black Ext. of Operations—Prefabricated Houses*, 48 M.C.C. 695, 708; *D. T. & C. Inc., Ext.—Willow Run, Mich.*, 49 M.C.C. 231, 240; *Parke & Son, Inc. Ext.—Numerous States*, 51 M.C.C. 422, 440; *New York Central R. Co. Ext.—Congers, N.Y.-Jersey City*, 61 M.C.C. 457, 462.

tection of existing motor carriers would appear from the Commission's decision in *Sheriff Motor Co. Contract Carrier Application*, 6 M.C.C. 247, 251. No motor carriers protested, but the trunk-line rail carriers opposed the granting of the application. There was no evidence of the availability of motor carrier service but only of rail service. The protestants cited the *C & D* case in support of their contention that the application should not be granted. The Commission said, "the circumstances in the present situation are quite different. The evidence here shows that existing carriers cannot as adequately or efficiently perform the desired service as can applicant."

This principle cannot be invoked where, as here, there is no existing motor-carrier service and its application would have the effect of preserving a railroad monopoly.

CONCLUSION

The report complained of herein demonstrates a mistaken impression as to the Commission's power, as well as its duty, under the Interstate Commerce Act. Where, as here, the need for motor-carrier service has been so clearly demonstrated, we think the Commission has a positive duty to grant the authority sought and thus make available to the shipping public the inherent advantages of such service. And even if the rail service could more accurately be said to be "reasonably adequate" the National Transportation Policy requires that shippers have made available to them adequate motor vehicle, as well as rail, service. The report seems to indicate that there is something almost reprehensible in a shipper desiring cheaper and faster service; yet the National Transportation Policy, among other things, specifically requires the Commission to promote—not obstruct—"adequate, economical, and efficient service" by the several carriers subject to its jurisdiction.

In *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I.C.C. 333, 337, the Commission said:

> It is not the province of railroads to determine what markets shall be available to sellers or buyers, or, by the refusal to establish through routes or the maintenance of rate disadvantages, to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets.

Paraphrasing the above in the light of the record herein, it is respectfully contended that it is not the province of the Commission to determine what modes of transportation shall be available to sellers or buyers, or by the refusal to authorize truck service, to restrict or circumscribe the opportunities of shippers to compete in markets by the use of such service. It is its function to see that reasonable competition between the different agencies of transportation is fostered and preserved and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets through utilization of all available transportation agencies. The Commission, Division 4, put the matter succinctly in *Levisa River R. Co. Construction*, 257 I.C.C. 203, 218:

> Shippers in any territory should not be denied the widest possible choice of markets over the shortest and most economical routes, if that can be avoided.

The decision herein is contrary to the National Transportation Policy. It promotes inadequate and inefficient rail service, and fails to recognize and preserve the inherent advantages of truck service. It abandons the duty, set forth in the *Parker* case, *supra*, of "protecting the

public in the maintenance of an efficient motor transportation system" and promotes, rather than guards against, a transportation monopoly.

Wherefore, appellants pray that the judgment of the lower court be reversed and the case remanded with instructions to suspend, enjoin, annul, and set aside the report and order of the appellee, Interstate Commerce Commission, complained of herein, and for further proceedings consistent with this Court's opinion, and that this Court grant such further relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 26th day of August, 1957, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

4. On the National Industrial Traffic League, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Robert N. Burchmore, Esq., 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY

APPENDIX

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U. S. C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C., § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway,

or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if

there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(2) Unless otherwise specifically indicated in such certificate, the holder of any certificate heretofore issued under this part, or hereafter issued under this part pursuant to an application filed on or before the date on which this paragraph takes effect, authorizing the holder thereof to engage as a common carrier by motor vehicle in the transportation in interstate or foreign commerce of passengers or property over any route or routes or within any territory, may without making application under this section engage, to the same extent and subject to the same terms, conditions, and limitations, as a common carrier by motor vehicle in the transportation of passengers or property, as the case may be, over such route or routes or within such territory, in commerce between places in the United States and places in Territories or possessions of the United States.

(3) Subject to the provisions of section 210, if any person (or its predecessor in interest) was in bona fide operation on March 1, 1950, over any route or routes or within any territory, as a common carrier engaged in the transportation of passengers or property by motor vehicle in commerce between any place in the United States and any place in a Territory or possession of the United States, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on March 1, 1950, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Commission shall issue a certificate authorizing such operations without

requiring further proof that public convenience and necessity will be served thereby, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after the date on which this subparagraph takes effect. Pending the determination of any such application, the continuance of such operation without a certificate shall be lawful. Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a certificate pending the determination of such application in accordance with section 207(a).

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application; if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any propietary or property rights in the use of the public highways.

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No. 20

IN THE

Supreme Court of the United States

October Term, 1957

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of South Dakota, Northern Division

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In The

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October Term, 1957

No. 20

Schaffer Transportation Company and American Trucking Associations, Inc., *Appellants*,

v.

United States of America and Interstate Commerce Commission, *Appellees*.

On Appeal from the United States District Court for the District of South Dakota, Northern Division

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APPELLANTS' REPLY BRIEF

Preliminary

This reply brief is filed primarily because the briefs of appellees, particularly that of the Interstate Commerce Commission, rely, for their supporting arguments, on facts not of record and not even discussed in the Commission's report itself. In addition, the exposition of appellees' views of the Commission's authority under the National Transportation Policy makes it further evident that the decision herein violates that Policy, and we take this opportunity to set forth our additional views respecting that aspect of the case.

The brief of appellee railroads (p. 9) seems to agree with our argument, set forth at pp. 7-14 of our original brief, that for many years the Commission consistently

recognized that the existence of adequate railroad service affords no basis for the denial of motor carrier operating authority. The brief of the Commission does not challenge the accuracy of that statement. However, the railroads dispute our statement to the effect that the Commission's consistent construction covered as long a span of time as we claim (1935-1950), by reference to *Bailey Common Carrier Application*, 33 M.C.C. 537. We note, at p. 12, footnote 9a, *infra*, the factual distinction between *Bailey* and this case. But, assuming, *arguendo*, that it is directly opposed to our contention, we have cited some 60 cases in our original brief (pp. 7-10) which do support it. Thus, in any event, *Bailey* represents only an isolated example of a departure from the Commission's long line of decisions to the contrary, both preceding and following it, and can scarcely support the rail claim that it represented a change, *at that time*, 1942, in the Commission's interpretation of the law. In any event, if, as we contend in our original brief (pp. 10-12), Congress confirmed the Commission's earlier interpretation when it substantially reenacted § 202(a) of the Motor Carrier Act of 1935 as part of the National Transportation Policy, it thus ~~confirmed the Commission's earlier interpretations and~~ put it beyond its power to alter, in 1942, or any other year. Answering this contention, appellee railroads say, of necessity, that the National Transportation Policy "repealed" § 202(a) of the Motor Carrier Act in such a manner as to require the Commission to change its rule of decision based on cases decided before the enactment of the Policy (Rail brief, pp. 13-14).[1] The Commission's brief (pp. 33-40) is more general on the point, contending that its duty to "foster sound economic conditions in transportation," im-

[1] We do not, of course, contend that enactment, in 1940, of the National Transportation Policy did not "repeal," technically, the provisions of former §202(a) of the Motor Carrier Act. We adhere, however, to our contention that the substance of §202(a) was reenacted as part of the National Transportation Policy.

posed by the Policy, justifies its decision here, and, citing this court's reference in *I.C.C.* v. *Parker*, 326 U.S. 60, 66, to the "overlapping aims" produced by the language of the Policy, seems to contend that it, the Commission, has been authorized to determine in any given case whether the shippers desiring it shall be allowed *any motor carrier service whatsoever.*

The Appellees' Briefs Misinterpret the National Transportation Policy

The briefs of both the railroads (pp. 13-16) and the Commission (pp. 33-40) quote an excerpt from this Court's decision in *I.C.C.* v. *Parker*, 326 U.S. 60, 66, wherein the Court noted that the broad generalizations of the National Transportation Policy ". . . must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interest in the different types of carriers with due regard to the declared purposes of Congress." Using this statement as a springboard, the appellees jump to the conclusion that the Commission has discretion to deny a motor carrier application, in effect, in order to preserve the "inherent advantages" of the railroad mode of transportation.[2]

The first thing wrong with this contention is its assumption that because *Parker* held that the Commission had

[2] The Commission's brief also claims that its action here serves to "foster sound economic conditions in transportation" as required by National Transportation Policy. As we shall show, that argument is not available to the Commission here. In addition, the very language of the Commission's brief (page 7), i.e., that the requirement of the National Transportation Policy requires it, not to ". . . favor one mode over another, but to preserve the inherent advantages of all," refutes the Commission's own argument. How a denial of Schaffer's proposed motor carrier service operated "to preserve its inherent advantages" completely escapes us.

discretion to authorize railroads to perform so-called auxiliary and supplemental truck operations in order to improve their over-all rail service, as against the contention of opposing motor carriers that their service was adequate to meet the shippers' needs, it necessarily follows that the Commission has equal authority to deny the right to perform motor-carrier service because existing railroad service is held to be adequate. We think the mere statement of the proposition demonstrates its absurdity, in view of the fact that in *Parker*[3] this Court was dealing with strictures imposed by Congress against rail entry into the motor field, which have no application whatsoever to efforts by independent motor carriers such as Schaffer to provide a service to the shipping public. And, parenthetically, since the Commission, to our knowledge, has never denied a railroad's request to perform a bona fide auxiliary and supplemental motor service,[4] does it not follow that a refusal to allow service by an independent motor carrier for the reason that railroad service is "adequate" constitutes highly discriminatory treatment of independent motor carriers, contrary to the requirement of the National Transportation Policy requiring the Commission to regulate *all* modes of transportation fairly and impartially?

In addition, the argument that the Commission has discretion, in cases such as this, to choose which mode

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[3] It is interesting, at least, to observe that the language of the *Parker* decision quoted in each of the appellees' briefs notes that the Congressional purpose "was to leave to the Commission authoritatively to decide whether *additional motor carrier service* would serve public convenience and necessity." (emphasis ours) Here, of course, there being no existing motor carrier service, Schaffer's proposed operations would not have constituted "additional" motor carrier service.

[4] The only motor operations Congress permitted railroads to perform. See the proviso of § 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b).

of transportation will be favored, in order to preserve only its "inherent advantages" is contrary to the cardinal rule that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 116, 25 L.Ed. 782, 783. Had the Commission granted Schaffer's application, the inherent advantages of motor carrier service would have been added to the inherent advantages of the already existing rail service.[5] A grant of the application would also have given assurance that granite shippers would receive efficient and economical service (both also required by the National Transportation Policy), far more likely to be brought about where competition between carriers is present than when one mode of transport is endowed with a monopoly.

The Commission's decision here brings to mind the words of its division 5 in *Towns of Bristol and Hill, N. H.* v. *Boston & Maine Transportation Co.*, 20 M.C.C. 581, 585:

> The Supreme Court has frequently held that we are an agency of limited powers and authority; that, while Congress may confer upon us powers and authority, their exercise does not extend beyond the express enactment or its fairly implied inferences; and that important powers should not be read into the act by implication but must be conferred in clear and unmistakable terms. *Thompson* v. *United States*, 246 U.S. 547; *United States* v. *Pennsylvania R. Co.*, 242 U.S. 208; and *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479. We have also stated that, in the absence of specific language, only the most unmistakable evidence of inten-

[5] The Commission's brief points out (p. 16) that even had Schaffer's application been granted, the shippers would have continued to use rail carload service. It also comments to the same effect at page 30 of its brief.

tion to confer upon us the power to act under given circumstances would warrant the assumption of such power through our own construction of the act. *Wisconsin R. Comm.* v. *Chicago & N. W. Ry. Co.*, 87 I.C.C. 195.

The Appellees' Briefs Assume Facts Not of Record And Not Discussed In the Commission's Report

The Commission's brief (page 37) urges that the National Transportation Policy requires that it "not . . . ignore the effect of additional transportation facilities upon existing facilities of all kinds." This, we assume, means that if the record in a motor-carrier application case indicates that a grant of the authority sought would seriously impair the revenues of rail protestants, the Commission would have discretion to deny the application solely for that reason. We categorically deny the validity of this contention; however, we make no effort to refute it, since the record herein contains no evidence whatever which would enable the Commission to gauge the effect of Schaffer's proposed motor-carrier service upon the revenues of the rail protestants. Recognizing this, the Commission's report contained no finding on this aspect of the case. Thus, the argument that a grant of Schaffer's application would have seriously affected the revenues of the rail protestants is not available to the Commission. This being so, the Commission's effort, at pages 6 and 37 of its brief, to imply that its denial of Schaffer's application was required by its obligation under the National Transportation Policy to "foster . . . sound economic conditions in transportation and among the several carriers" is completely devoid of evidentiary support.

We refer briefly to the testimony presented by the rail protestants in this case, summarized by the Commission at pages 36-37 of the record herein. Neither their

testimony,[6] nor the exhibits which they introduced, limited to route maps, listings of railroad mileages, stations and agencies, and locomotives and freight cars (Exhibits 14-20, R. 316-324), afford a basis for measuring the effect which Schaffer's service, had it been authorized, would have "upon existing facilities of all kinds," bearing in mind that the only existing facilities of any kind are rail facilties.

As pointed out in our original brief (footnote, page 3), Schaffer's application was denied by Division 5 insofar as it duplicated the existing service of Dingmann, the lone motor carrier protestant, and neither of the appellants took exception to this partial denial. Thus, the authority granted by Division 5 was limited to states where no other motor carrier service exists. The rail appellees, with commendable candor, admit, both in their statement of the question presented and their statement of the case (Rail brief, pages 1 and 3) that no existing motor carrier performs the service sought to be rendered by Schaffer. Despite this, the Commission's brief obscures the real issue in the case by reference (pp. 30-31) to the alleged failure of the supporting shippers to use "existing interline motor carrier service."[7] and follows

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[6] The sum total of the evidence adduced by the rail protestants was limited to the testimony of Witnesses Olsen (R. 200-202), Bushek (R. 202-205), and Keenan (R. 280-288), plus the exhibits referred to. These witnesses contributed nothing whatever upon which the Commission could base a finding respecting the competitive effect of Schaffer's proposed operation upon the railroads they represent, unless the opinion of Witness Keenan that a grant of the application would adversely affect the Central Vermont Railway (R. 281, 282) affords a basis therefor. We hardly need labor the point that this pure surmise could not serve as a foundation for such a finding.

[7] Note in this connection, the colloquy between counsel for applicant and Mr. Dingmann, the motor carrier protestant (R. 198):

"Q. I gather you believe that there is a real need for a motor carrier service from Vermont to the midwestern area

this with a quotation from *Pine Tree Transport, etc.*, 54 M.C.C. 669, to the effect that shippers are not entitled, as of right, to direct motor-carrier service *when reasonably adequate interline service is available.*" (Emphasis ours) The cited case, of course, has no application here, because the record clearly indicates that no interline service exists.[8] In addition, the citation of cases (I.C.C.

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and that there is now no motor carrier service available to render that service?

"A. That is correct.

"Q. That is to haul granite?

"A. That is correct, that is all that is involved."

[8] The Commission, at page 22 of its brief, cites pages 238 and 258 of the record in support of its statement that no attempt was made "to use motor carrier interline service from the above states [New England, New York, Pennsylvania] to points in the states named in the application." The very record cited makes it clear that no such interline service is available:

Cross-examination by rail counsel:

"Q. On any occasion has your company tendered any granite shipments to any of those motor carriers for furtherance beyond the line, that is interline shipment, interchanging the shipment at Philadelphia or New York or any other point for ultimate delivery in any one of these sixteen destination states?

"A. Not to my knowledge, is it possible. Answering you directly, no.

* * * *

"Q. Do you know whether or not there is such a service available?

"A. I understand there is not such a service available." (R. 238)

* * * *

"Q. And you know of your own knowledge that there are motor carriers transporting general commodities, including granite, west of Buffalo?

"A. No I don't know, not granite.

"Q. Granite may be transported in any conventional motor vehicle, may it not, even though it is a van truck or it makes it easier to have a semi-truck with a low side or a flat bed truck?

"A. I suppose in theory that is correct, but we have not been able to get anybody to handle it. It is too bulky and too heavy." (R. 258)

brief, pp. 24-25) in which the Commission has held that "*existing motor carriers* are entitled to transport all the traffic they can handle adequately, economically and efficiently without the competition of a new motor carrier service" (emphasis ours) is meaningless, in view of the fact that here there is no "existing motor carrier" service.[9] Here again, the Commission's brief somehow overlooks the fact that its report herein nowhere indicates that there is existing motor carrier service, single-line or interline. Thus the Commission's brief presupposes facts not of record and not dealt with in its report.

The briefs of both appellees contend that the amount of granite traffic which Schaffer would have been able to transport, had the application been granted, would be so negligible as to bring into question his *ability* to perform the service sought to be rendered; one of the factors, it is admitted, which the Commission is required to consider in passing on applications filed under § 207 of the Interstate Commerce Act (49 U.S.C. 307).

The Commission's brief (p. 22) refers to the statement of one supporting shipper witness from Barre, Vt., to the effect that "we would like to have" daily motor transportation. Referring to the same witness' testimony that his company would ship about "3000 pounds on an average a day," the Commission's brief concludes: "Obviously, no motor carrier could stay in business very long on that type of operation." This conclusion conveniently overlooks the fact that the witness was testifying with respect to shipments by his company only, whereas there are a total of seventy-three granite manufacturers in Barre, Vt., as noted by the witness at the same page of the record to which the Commission's brief refers (R. 232). This same comment is equally applicable to a similar contention made in the rail brief (p. 44). But

[9] We respectfully refer the Court to pages 26-30 of our original brief herein for a more detailed discussion of this subject.

more important, these arguments address themselves to Schaffer's *ability* to perform the proposed service which, while a factor to be dealt with in application cases such as this, was never touched on by the Commission's report which is before the Court!

Denial of Motor Carrier Service, Where None Exists, May Not be Based on Shippers' Desire for Lower Rates

The brief of the Commission (pp. 12-24) makes extensive reference to the record herein in an effort to support the denial of Schaffer's application, based, in part, on its finding (R. 37) that "the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service," and its ultimate conclusion that "this is not a proper basis for a grant of authority, and the application, therefore, must be denied." We have already dealt on brief (pp. 21-23) with this aspect of the case, and we respectfully refer the Court to our discussion thereof. But something needs to be said respecting the cases cited at page 26 of the Commission's brief in support of its argument.

The cases cited by the Commission are, with one exception, instances in which it has refused to allow the institution of motor carrier service where the record showed that such service, not shown to be inadequate, was already being performed. Thus, for example, in *Wellspeak Common Carrier Application*, 1 M.C.C. 712, cited in the Commission's brief, the report of the Commission, division 5, notes (714) that about 40 motor carriers were "rendering a service similar to that here proposed."

The *Youngblood* case, 8 M.C.C. 193, cited by the Commission, does indicate that the traffic involved, soda ash, was being handled by the rail protestants. And, in denying the application, the Commission's division 5 did state

that the ". . . only convincing evidence as to applicant's ability to obtain this traffic is the fact that he proposes to charge a lower rate than that now being charged." Perhaps the fact that various motor carriers opposed Youngblood's application, unlike the situation here, may have been a factor in the division's decision, although it must be conceded that its report does not clearly support this supposition.

Our search reveals that *Youngblood*, decided in 1938, has been cited only twice. One such citation occurs in another case referred to by the Commission, *Johnson*, 18 M.C.C. 194, wherein an applicant proposed to transport passengers in such jerry-built equipment (home-made wooden bus body attached to an ordinary tractor-trailer unit) that the joint board's report adopted by division 5 stated that it was unable to conclude ". . . that it is proper for operation in passenger transportation." The report in the *Johnson* case also indicates that the proposed service would be rendered in competition with "established motor carriers operating bus lines in the territory involved." The only other citation of *Youngblood* located is contained in *Dixon and Koster Contract Carrier Application*, 32 M.C.C. 1, 4, in which the proposed operation would have competed with both existing motor and rail service.

The only other cases cited in either of appellees' briefs which even remotely support the argument that the Commission has discretion to deny an application to provide *motor* service in order to protect existing *rail* service are the *Bailey* case, referred to at p. 2, supra, and *Worm Extension*, 32 M.C.C. 641, where, as the rail brief fairly points out, motor carrier service was available to part of the area involved.[9] A run-down of the *Worm*

[9] The report of division 5 in the *Worm* case indicates that for-hire motor service was available to one of the points involved and that the supporting shipper was using his own trucks for move-

case indicates it has been mentioned in other proceedings on three occasions. In *Lang Transp. Corp.* v. *U.S.*, 75 F. Supp. 915, 924, the District Court noted that ". . . plaintiffs herein have been quite profuse in citing authorities . . ." and in referring to such citation of authorities, a footnote includes *Worm*. In *Wilson* v. *U.S.*, 114 F. Supp. 814, 819, the District Court cited *Worm* in noting that the Commission has often stated that existing *motor carriers* ". . . should normally be accorded the right to transport all traffic which they can handle adequately, efficiently and economically in the territory served by them . . ." as against the entry of another motor carrier. The decision of the Commission's division 5 in this case expressly acknowledged the validity of that philosophy when it denied Schaffer's application to the partial extent that it duplicated the service the protestant motor carrier Dingman is authorized to perform and, as previously stated, neither protestant took exception to such partial denial.

The only other citation of the *Worm* case occurs in *Commercial Barge Lines, Inc., Ext.—Grain*, 285 I.C.C. 549, 556, where the Commission's division 4, in denying water carrier authority because the record there indicated that ". . . existing water carriers are presently rendering reasonably adequate service" (285 I.C.C. 557), simply notes that the rail protestants cited it in support of their contention that the application should be denied. It is pertinent, we think, to note that although the rail protestants there contended ". . . that they are able and willing to transport all traffic here considered between the cities

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ments to the other point. 32 M.C.C. 642-643. The report of division 5 in the *Bailey* case notes that "a number of private carriers", including some who supported Bailey's application, were engaged in operations in the territory involved, and that the discontinuance of their operations was conditioned upon Bailey's rates "not being out of proportion to the present cost of private transportation." 33 M.C.C. 538.

reached by their lines . . ." and the report made no finding that their service was in any way inadequate, it was the adequacy of the existing service of the *same type*, i.e., water carriage, that furnished the basis for the denial of the similar authority there sought.

In any event, if the *Youngblood*, *Worm* and *Bailey* cases can be said to be on all fours with this aspect of this proceeding (and we have pointed out the somewhat dissimilar factual situations in those cases from that involved here), they represent isolated departures from a long line of consistent interpretations, both before and after them, wherein the denial of authority was limited to situations involving efforts to provide motor carrier service in competition with *similar* existing service not shown to be inadequate.

We have discussed, at pages 26-30 of our original brief, the many cases (footnotes 15 and 16) in which the Commission has held that existing motor carriers should be permitted to handle all available traffic without the intrusion of a new competitor in the absence of proof of inadequacy of the similar service already existing.

The cases cited in our original brief, and those cited by the Commission, except *Youngblood*, support the proposition that the Commission has discretion to refuse to risk the creation of excess motor carrier service, where the service provided by existing motor carriers has not been demonstrated to be unsatisfactory. As such, we have no quarrel with them—indeed, we think they properly interpret the statute which the Commission administers. But the Commission would have the Court apply them to the entirely different factual situation here. Where, as here, no motor carrier service exists, why is there something improper in a desire by the shippers supporting the institution of such service for low rates by the motor carrier proposing to provide such service? Suppose, for example, counsel for rail protestants, cross-examining one of the supporting

shippers, had asked him: "Would you be willing to pay Schaffer $5000 to transport a truckload of granite from Barre, Vt. to Dallas, Texas?" Since the answer would obviously have been in the negative, would the Commission have held, as it did here, that such testimony was not a "proper basis" for a grant of authority? We think not; yet the mere fact that rail counsel was successful, in cross-examination, in securing an admission, in effect, that the supporting shippers hoped that Schaffer's rates would be lower than the existing rail less-carload rates (R. 260-261), is said to constitute grounds for denial of motor carrier service where only rail service exists.[10] In view of the fact that the National Transportation Policy requires, among other things, economical and efficient service, it seems strange indeed that Schaffer's application was denied, in part, because his proposed service offered an opportunity to achieve these aims.[11]

If, indeed, the supporting shippers are interested only in rates lower than the present rail rates, a grant of Schaffer's application could not have harmed the rail protestants, unless he ultimately published lower rates than theirs. Should this happen, the railroads could request the Commission to suspend their becoming effective, conduct an investigation, and find them unreasonably low. Should such an investigation show the motor rates to be unreasonably low, the rail protestants still would have suffered no harm. On the other hand, should

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[10] See, in this connection, the complaint of one of the supporting shippers that certain ". . . dealers, because they are handicapped in the length of time involved for less than carload shipment, and because of the cost, are changing their buying habits to centers from which they can get quicker service and because of trucking service, lower rates.

We feel that it is a serious handicap to the granite industry of Vermont." (R. 225)

[11] Our original brief (pp. 21-23) deals with the many ways, noted by the report of Division 5, in which Schaffer's proposed service would be more efficient than the existing rail service. We need not repeat them here.

the lower motor rates be held reasonable, the railroads would have no valid cause for complaint.[12] This demonstrates, we submit, that the real basis for the Commission's denial of Schaffer's application was simply to protect the protestant railroads from the *proper* competition, both rate- and service-wise, which his application proposed.

We conclude this subject with examination of the Commission's statement (ICC brief, p. 27) that its decision here ". . . where the evidence indicates a dissatisfaction with existing rates rather than a need for transportation service as such" is squarely supported by this Court's decision in *American Trucking Associations* v. *United States*, 326 U. S. 77, and its similar contention (pp. 28-29) respecting *Atlanta-New Orleans Motor Freight Co.* v. *U. S.*, 10 Federal Carrier Cases 2085.

Reference to the facts of the *American Trucking Associations* case demonstrates the infirmity of the claim made for it. There, a railroad was authorized by the Commission to perform so-called auxiliary and supplemental motor operations (326 U. S. 79). The argument was made that the railroad "had been permitted to file illegal tariffs * * * and has been improperly exempted * * * from certain accounting requirements." 326 U. S.

[12] It is noted that both the brief of the Commission (p. 38) and that of the railroads (p. 15) refer to a passage from the cited Senate report, containing the statement that ". . . some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, *and to discourage other forms of transportation from entering therein.*" (our emphasis) The use of the word "discourage" rather than "prohibit" strongly suggests that the Committee was referring to the Commission's rate powers, rather than its power, under § 207 of the Act (49 U.S.C. 307), to deny entry into the motor carrier field in the first instance. As to what particular "niche" the transportation of granite should occupy, we point out that two of the cases cited in our original brief (footnote, p. 8) in which the Commission held that shippers were entitled to adequate motor, as well as rail, service, *Murphy*, 9 M.C.C. 361, and *Heartz*, 10 M.C.C. 634, involved the transportation of granite.

86. As to this contention, the Court simply held that the argument should have been made under other provisions of the Act. We have examined in vain the cited decisions of this Court and the District Court, whose decision it reversed, 56 F. Supp. 394, for the slightest intimation that the *level of rates* had any bearing on the conclusion reached.

Little need be said of the Commission's claim that the decision in *Atlanta-New Orleans Motor Freight Co., et al. v. U.S., et al.*, 10 Federal Carrier Cases 2085, supports its decision here. That case involved an effort by nine motor common carriers to upset a Commission order authorizing service by a *similar* carrier. Among other contentions, the plaintiffs alleged that the Commission's order was based on the unreasonableness of certain rates on textiles and textile products, not a proper issue before the Commission. The holding of the court (page 2087) was that the rate matters "were not directly involved therein, they were not the subject matter of the proceedings, and it appears that the Commission disclaimed that its order . . . was based on rate considerations . . . There was sufficient evidence, independent of evidence as to rates, to support the Commission's order."

Thus, the Commission's claim that the decisions referred to support its denial of Schaffer's application here is completely refuted.

The Commission's Decision is Not Supported by the *Alton* Case

The briefs of the Commission (pp. 39-40) and the rail appellees (pp. 17-18) cite *Alton R. Co. v. United States*, 315 U. S. 15, 62 S. Ct. 432, as authority for the Commission's decision here, the Commission's brief making the extreme statement ". . . that the rationale of this decision, without more, demonstrates that it was proper for the Commission to take into account, with other factors, the adequacy of the existing railroad service."

We have already shown that the Commission's report, in denying Schaffer's application, took into account only two factors: (1) the adequacy of the existing rail service; and (2) the fact that the supporting shippers expressed a desire for lower motor carrier rates than those charged by the railroads. Other factors which may, or may not, have been in the back of the Commission's mind, but were not discussed in its report, are not before the Court for consideration. Thus, in reality, the Commission's contention amounts to no more than the claim that the *Alton* decision supports its denial of Schaffer's application for the two reasons stated. Again appellees have jumped to a conclusion completely unwarranted by an objective view of the case cited to support their argument. The *Alton* case dealt solely with the question of whether the Commission erred in issuing a certificate of public convenience and necessity to the applicant, Fleming, under the provisions of the so-called "grandfather clause", §206(a) of the Motor Carrier Act of 1935 (49 U.S.C. 306(a)). The railroads in the case brought suit to set aside the Commission's order on the ground that it had authorized Fleming to perform an operation greater in scope than his operations prior to the "grandfather" date, June 1, 1935. The *Alton* case, unlike this case, did not involve the question of the adequacy of railroad service, nor whether the support for the application was based on a desire for lower rates.[13]

But, say the appellees, the *Alton* case did hold that the railroads had standing to sue to set aside the Commission's order, and it therefore follows that *Alton* supports the Commission's decision here. This exercise of logic, which, we submit, would do justice to Lewis Carroll, is altogether erroneous.

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[13] Since Fleming, under the "grandfather" clause was entitled, as of right, to continue the same operations conducted "on June 1, 1935 . . . and . . . since that time", the question of rates, of course, had no bearing on the case.

The appellants have never contended—and do not contend here—that the railroads were not entitled to participate in the proceeding before the Commission or that, had they been less pleased with its decision, would not have had standing to sue. But that is a far cry indeed from saying that, once *rail* service is shown to be adequate, the Commission may deny an application to *provide a different type of transportation service*, for that reason.

Any applicant who seeks to institute interstate motor carrier operations must demonstrate, with some degree of exactitude, that the service is needed and, in addition, that he is "fit, willing, and able properly to perform" the proposed service, etc. 49 U.S.C. §307. Railroad protestants, we believe, are entitled to participate in such proceedings in order to put the applicant to his proof as to the points or area claimed to need the proposed service, and in order to attempt to demonstrate that he is unfit, unwilling or unable to properly perform the proposed service. And we likewise assume, *arguendo*, that should they feel that applicant failed, wholly or partially, to meet the statutory burden, they might challenge as fatally defective a Commission order authorizing any service, or more than they consider justified, as the case may be. This is the holding of the *Alton* case as we read it. It may not be contorted, as appellees have attempted, to support the Commission's denial of Schaffer's application on the ground that existing rail service is adequate.

The Discussion of Other Statutes is Beside the Point

As previously noted, the real basis for the denial of Schaffer's application was the Commission's desire to protect the rail protestants from the competition, rate- and service-wise, which his application proposed.

The brief of the rail appellees (pp. 24-40) discusses at length certain amendments to the Natural Gas Act and the Freight Forwarder Act and their respective legislative histories. Stated briefly, we understand the rail contention to be that the amendments referred to support their argument that the Commission has discretion to consider their competitive interests in applications by motor carriers to perform a different type of transportation service. While we completely disagree with that interpretation of the Commission's authority under the statute which it administers, it is unnecessary to labor the matter. We have already pointed out, at p. 6, *supra*, that the record here is completely devoid of evidence which would enable the Commission to make any determination respecting the impact, if any, of Schaffer's proposed operations upon the rail protestants, and that the Commission's report itself contains no finding on this aspect of the case. No more need be said.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 4th day of November, 1957, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

4. On the National Industrial Traffic League, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Robert N. Burchmore, Esq., 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY

Office - Supreme Court, U.S.
FILED
OCT 17 1956
JOHN T. FEY, Clerk

No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1956

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, NORTHERN DIVISION

MOTION TO AFFIRM

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Washington 25, D. C.

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MOTION TO AFFIRM

Pursuant to Rule 16, par. 1 (c) of the Revised Rules of this Court, appellee, Interstate Commerce Commission, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered May 25, 1956, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order denied the application of appellant

A. W. Schaffer, d. b. a. Schaffer Transportation Company, (hereinafter called Schaffer) for a certificate of public convenience and necessity pursuant to Section 207 (a) of the Interstate Commerce Act, 49 U. S. C. 307 (a). The order was predicated upon the ultimate finding that "applicant has failed to establish that the present or future public convenience and necessity required the proposed operation. * * *" (J. S. 65).

After the completion of the administrative procedure, appellants sought relief from a three-judge statutory district court. On review, the court, in a comprehensive decision (J. S. 14–25), unanimously sustained the Commission's report and order. Thereafter on May 17, 1956, it issued its judgment dismissing the complaint (J. S. 26, 27).

ARGUMENT

The Commission, under the provisions of Section 207 (a) of the Interstate Commerce Act, 49 U. S. C. 307 (a) (J. S. 72), is authorized to grant certificates of public convenience and necessity to qualified applicants desiring to perform transportation in interstate commerce provided that the Commission finds, among other things, that proposed service is required by the present or future public convenience and necessity. Otherwise, the application shall be denied. In its report in *A. W. Schaffer Extension—Granite*, Docket No. MC–93529 (Sub No. 2), decided February 7, 1955, the Commission found that public convenience and necessity did not require the operation by appellant, Schaffer, as a common carrier by motor vehicle

of granite from points in Grant County, South Dakota, to points in ten states and the District of Columbia, and from Vermont to points in sixteen states (J. S. 49–65). The ultimate finding was based upon the conclusion that the existing service was adequate and that the shippers which supported the application were motivated by desire for lower rates rather than improved service (J. S. 65). Accordingly, the Commission found that appellant Schaffer had failed to fulfill the essential requirement of Section 207 (a) of the Interstate Commerce Act, namely, to establish that "the proposed service * * * is or will be required by the present or future public convenience * * *." The conclusion and ultimate finding were based upon uncontroverted adequate findings of fact fully set forth in the Commission's report (J. S. 49–65).

The sole issue raised on appeal by appellants is that the Commission in denying the application predicated its decision upon a finding that existing rail service was adequate, and that as a result no need was shown for the proposed service by Schaffer. Appellants contend that such a finding violates the "* * * underlying purpose of the Interstate Commerce Act and contravenes the National Transportation Policy * * *" (J. S. 5). The Commission did not deny the application upon such a finding. A careful reading of the Commission's report (J. S. 49–65) clearly shows that it based its conclusion upon findings of fact resulting from an analysis of the entire record which disclosed the adequacy of existing rail *and* motor carrier service (J. S. 64–65). The Commission further found in

essence that independent of the sufficiency of the existing transportation facilities, the applicant had failed to maintain the burden of proof showing a need for his service, because the shippers were interested only in lower rates rather than a need for improved service (J. S. 65). The Commission has consistently refused to consider the issue of rates as pertinent in proceedings for operating authority since that is a matter for which other sections of the Interstate Commerce Act provide a remedy. *Wellspeak Common Carrier Application*, 1 M. C. C. 712; *Youngblood Extension of Operations—Canton, N. C.*, 8 M. C. C. 193; *Johnson Common Carrier Application*, 18 M. C. C 194; *Omaha & C. B. Ry. & Bridge Co. Common Carrier App.*, 52 M. C. C. 207, 235; *Black Extension of Operations—Prefabricated Houses*, 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products*, 51 M. C. C. 343, 350. The report of the Commission also shows that several of the supporting shipper witnesses had failed to investigate the availability of existing motor carrier service (J. S. 56, 57, 58, 59).

Thus the principal issue left for judicial review as found by the district court was "* * * whether there is a reasonable and rational basis for the orders predicated upon the findings of the Commission and whether the Commission's actions in the premises complies [sic] with the Congressional mandate as set forth in Part 2 of the Interstate Commerce Act (49 U. S. C. 301–327) and the National Transportation Policy (49 U. S. C. preceding Sec. 1)."

The district court in unanimously upholding the Commission's action concluded (J. S. 23):

> We have carefully reviewed the evidence in this case, and without detailing it, we are unable to say that the Commission's conclusions and orders are not supported by substantial evidence, or that it acted illegally, arbitrarily or capriciously.

In addition, the court pointed out that while it might "* * * have reached a different conclusion if it had been weighing the evidence in this case * * *" nevertheless, it held "* * * the Commission acted within the scope of its authority, that the Commission acted without abuse of its discretion, that its action was not arbitrary or capricious, and that there were adequate facts to support its findings and that its conclusions are not contrary to law" (J. S. 25). See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241.

We submit that the Jurisdictional Statement reveals a misconception of the issues of the case, and that the sole question upon review is whether or not the Commission properly determined the public convenience and necessity, a matter delegated by Congress to the administrative discretion of the Commission. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65. We further submit that the Jurisdictional Statement does not raise any special or unusual circum-

stance which warrants a reanvassing of the record by the Court. *New England Divisions Case*, 261 U. S. 184, 203, 204; *Radio Corp. v. U. S.*, 341 U. S. 412, 415.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

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Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 419

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

This appeal by a motor carrier and by an association of such carriers seeks review of the judgment of a three-judge district court affirming an order of the Interstate Commerce Commission. The United States is an appellee but it believes that the appeal presents an issue of importance under the Interstate Commerce Act and that probable jurisdiction should be noted. The facts which the Government believes to be pertinent are as follows:

Schaffer Transportation Company (Schaffer), which holds a certificate authorizing it to transport granite as a common carrier by motor from points in Grant

County, South Dakota, to 15 states primarily in the midwest, applied to the Commission for authority to transport granite as such a carrier from Grant County to points in 10 additional states, and from points in Vermont to destinations in 16 midwestern or southwestern states (J. S. 29). After a hearing, the Commission's examiner recommended granting the authority requested (J. S. 41). On exceptions to the examiner's recommended order, Division 5 of the Commission, with one Commissioner dissenting, approved grant of the requested authority, with one limitation the validity of which is not in issue in this proceeding (J. S. 47-48).[1]

Schaffer's application was supported by three shippers of granite, by an association having 67 granite manufacturer members, and by six dealers who receive granite shipments from manufacturers (J. S. 31, 39). Division 5 found that, with the exception of transportation from Grant County to destinations in four states, the shippers and receivers who appeared as witnesses "have no for-hire motor service available to them to and from the points covered by the instant application" (J. S. 46). It found that all of the supporting witnesses agreed that existing rail service is "entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but also and primarily from a service standpoint" (*ibid.*). It also found further that the affected shippers "are faced with the competitive disadvan-

[1] The Division, having found that there was a certificated motor carrier engaged in transporting granite from Grant County to four of the states included in Schaffer's application, denied it authority to transport between the points as to which there was other available motor service (J.S. 40-41, 45, 47).

tage of having to compete with producers of granite at other locations which have truck delivery available"; that the lack of truck service handicaps these shippers in increasing their sales and expanding their markets; and that the proposed truck service would enable the dealer witnesses to maintain lower inventories, receive shipments faster and more frequently, and reduce the amount of crating necessary (*ibid.*). The Division observed that grant of the application would cause some diversion of traffic from the railroads, but it stated that "no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers" (J. S. 46-47).

The full Commission, by a closely divided vote, reversed Division 5. After a review of the evidence, it stated that all of the supporting witnesses complain that "rail service is too slow". It said that less-than-carload rail service, which is seldom used because of its higher cost, is "fairly good" although "not as expeditious as" the proposed motor service. It stated that it was "forced to conclude that the service presently available is reasonably adequate", and that the shippers' and receivers' main objective is "to obtain [lower] rates rather than improved service." The Commission's ultimate finding was that it had not been established that present or future public convenience and necessity require the proposed motor service. (J. S. 64-65.)

The district court held that the foregoing ultimate finding was supported by substantial evidence, and that the Commission had not acted illegally or arbi-

trarily (J. S. 23). The court held that the Commission had properly determined the adequacy of existing service "without regard to whether the existing service is provided by the railroads or other motor carriers" (J. S. 22). The court, in rejecting the contention that the Commission's action was contrary to the mandates of the National Transportation Policy, said that the Commission, having weighed all salient factors, was not required to set forth its findings in the terms of the provisions of that policy (J. S. 23-24).

DISCUSSION

The Commission's order denying Schaffer's application precluded the furnishing of transportation by motor to shippers whose only available transportation service was by rail. Although on the Commission's own findings the proposed motor service was faster, more flexible, and cheaper than the existing rail service, the application was denied upon the ground that the rail service was "reasonably adequate".[2] Appellants contend, and we think correctly, that the Commission in so acting failed to give effect to the National Transportation Policy declared by Congress (49 U. S. C. notes preceding §§1, 301, 901), that there shall be "fair and impartial regulation" of all modes of transportation subject to the Act, and that its provisions be administered so as to "recognize and preserve the inherent advantages" of each mode of transportation.

Section 207(a) of the Act, 49 U. S. C. 307(a), directs the Commission to grant a certificate of operating authority if a proposed motor carrier service is required

[2] Division 5 had found, on the same evidence, that the rail service was "entirely inadequate" (*supra*, p. 2).

by public convenience and necessity. When, as here, railroads have a monopoly of certain transportation and the proposal is to provide significantly better transportation service by means of trucks, it would seem that the Congressional mandate is frustrated if "reasonable adequacy" of the existing rail service is made the criterion of public convenience and necessity. This shuts the door upon the advantages inherent in the proposed truck service, and it maintains the *dis*-advantages, not the advantages, inhering in the mode of transportation first in the field.

This Court has not hesitated to strike down orders of the Interstate Commerce Commission involving applications of the Act not consistent with preserving the advantages possessed by one mode of transportation compared with some other mode. In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, the Court invalidated an order of the Commission which approved higher rail rates for the transportation of grain east of Chicago if it had arrived at Chicago by barge rather than by rail, and held that the National Transportation Policy, as well as other provisions of the Act, forbade this discrimination. The Court said that Congress "left the Commission no discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part." 330 U. S. 579.

Dixie Carriers, Inc. v. *United States*, 351 U. S. 56, held that when the railroads had established and were maintaining a through route and joint rate for all-rail traffic between certain points, the Commission erred in refusing to establish a through route and a joint rate for rail-barge traffic between the same points, because shippers were thereby denied the "inherent ad-

(R. 22–23). The Division based its conclusion on the following findings:

Aside from the service as to which operating authority was denied, shippers and receivers "have no for-hire motor service available to them to and from the points covered by" Schaffer's application. All the supporting witnesses agreed that rail service was entirely satisfactory for carload shipments "but entirely inadequate for the transportation of less-than-carload shipments, not only from the standpoint of cost, but also and primarily from a service standpoint", because of the delays and damage to merchandise experienced in these shipments. The monument manufacturers, asked by their customers to ship by truck, have been "faced with the competitive disadvantage of having to compete with producers of granite at other locations which have truck delivery available," and lack of truck service has handicapped them in increasing their sales and expanding their markets.[1] In addition, truck shipments require less crating, with resulting time and money savings. The

[1] There was testimony that Barre has a reputation for "finely carved and sculptured memorials", that it is noted for its very skilled craftsmen and artisans, and that it has long been known as "more or less the memorial art center" (R. 134). A Barre manufacturer with annual shipments of 1,600,000 pounds into the 16 involved western states testified that he understood that producing areas in Georgia and Minnesota had motor carrier service to the midwest area and that salesmen and an occasional dealer had told him that his company had lost business because of the lack of like service to this area (R. 230). Another manufacturer shipping annually 5,000,000 pounds into the 16 states expressed the firm conviction that institution of Schaffer's service would increase his business in these states (R. 255).

proposed motor service would likewise benefit monument dealers. They would "receive their freight faster and more frequently", would be able to maintain lower inventories, and would be aided in meeting deadlines fixed by their own customers. (R. 21–22.)

The Division recognized that grant of the application would unquestionably divert some traffic from the railroads (R. 22). Its position on this was that "no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers" (*ibid.*).

On petitions for reconsideration filed by the opposing railroads, the full Commission assumed jurisdiction of the proceeding (R. 25) and, by a six to four vote (R. 366),[5] found that Schaffer had failed to establish that public convenience and necessity require the proposed service. The grounds given for this finding were that the presently available rail service is "reasonably adequate"; that those who supported the application did so mainly in order to "obtain lower rates rather than improved service"; and that this is "not a proper basis" for grant of new operating authority. The Commission also stated that, although all supporting witnesses had found fault with the presently utilized rail service, they nevertheless are "reasonably satisfied" with this service except for the one universal complaint that "rail service is too slow", but that less-than-carload rail service, "while not as ex-

[5] See also appellant's brief, note 1a, page 3.

peditious as the proposed service, is fairly good" (R. 37).

The district court, in upholding the Commission's order, stated that it was "unable to say" that the Commission's conclusions and orders are not supported by substantial evidence, or that it acted illegally, arbitrarily or capriciously (R. 366). The court reached this conclusion after referring to the Commission's finding that existing rail service is "reasonably adequate", and after adopting the view that the Commission, in determining the need of shippers for a proposed new service, is entitled to weigh such need "against the capabilities and facilities of the existing carriers" without regard to whether this weighing involves only rail capabilities and facilities (*ibid.*).

In the district court, the United States supported the Commission's order. After the appeal was filed, the United States concluded, on further analysis of the facts and issues, that the Commission's order probably is erroneous, and it filed a memorandum opposing the Commission's motion to affirm. After further study of the case, the United States adheres to this conclusion, and this brief therefore supports the appellants.

SUMMARY OF ARGUMENT

The Commission found that the motor service for which Schaffer sought a grant of operating authority would be superior to the rail service which alone was available to the shippers whom he sought to serve. The Commission nevertheless found that the proposed service was not required by public convenience and

necessity. The grounds of this finding were that the existing rail service was reasonably adequate and that the shippers supporting Schaffer's application were more interested in obtaining lower rates than in obtaining improved service. We believe that, under the statute, neither of these grounds constitutes a valid basis for rejection of Schaffer's application.

The more expeditious service which he proposed was of material importance to the shippers concerned, and this improvement in service was an advantage inhering in service by motor as distinguished from service by rail. The National Transportation Policy declared by Congress requires that the Interstate Commerce Act be so administered as to recognize and preserve the "inherent advantages" of each of the modes of transportation subject to regulation, rail, motor, and water, and that all of the provisions of the Act be administered with the view to effectuating this policy. Where, as here, railroads have a monopoly of the transportation involved, the proper measure of whether a proposed motor service is required by public convenience and necessity is not the reasonable adequacy of the rail service, viewed from the standpoint of the economics and practicalities of railroad operations. The necessary test, which the Commission failed to apply, is whether the proposed motor service is superior to the existing rail service, in a respect inhering in the differing mode of transportation.

The fact that the shippers supporting Schaffer's application desired both better rates and improved service is likewise not a valid ground for rejecting the

application. The advantage of improved service is not nullified or rendered illegitimate by the shippers' expectation that it will also be a lower-cost service. Moreover, irrespective of whether service at lower rates is a matter of public convenience and necessity when a motor carrier seeks to enter a field already served by other motor carriers, proposed lower-cost motor service for those having only rail service represents, at least under the facts of this case, an advantage inhering in the different mode of transportation. We submit that the decisions of this Court holding that the Commission may not so administer the Act as to withold from water carriers or the public the advantages inhering in the low cost of water transportation are applicable and controlling here.

Our interpretation of the application of the National Transportation Policy to the facts of this case accords with both this Court's interpretation of the effect of this policy declaration and the interpretation which, as indicated by legislative history, was intended by Congress.

ARGUMENT

THE INTERSTATE COMMERCE COMMISSION'S REJECTION OF SCHAFFER'S APPLICATION FOR AUTHORITY TO PROVIDE A MOTOR SERVICE SUPERIOR TO THE RAIL SERVICE WHICH ALONE WAS AVAILABLE TO SHIPPERS MISINTERPRETED THE STATUTORY TEST OF "PUBLIC CONVENIENCE AND NECESSITY", IN THAT THE COMMISSION THEREBY DENIED TO THE PUBLIC "INHERENT ADVANTAGES" OF A DIFFERENT MODE OF TRANSPORTATION, CONTRARY TO THE MANDATES OF THE NATIONAL TRANSPORTATION POLICY DECLARED BY CONGRESS

The United States does not contend that the public convenience and necessity of a proposed motor service is established in and of itself by a showing that rail service is the sole available common carrier service. It does urge that, when railroads have such a monopoly, the Commission misinterprets the "public convenience and necessity" criterion if it bars from the field a motor carrier proposing to furnish significantly superior service. Such action by the Commission, in our view, contravenes the command of the National Transportation Policy: That the Commission shall administer all provisions of the Interstate Commerce Act to the end that the "inherent advantages" of each of the three modes of regulated transportation be recognized and preserved and that "adequate, economical, and efficient" transportation service be promoted.

The Commission's own findings establish that Schaffer proposed a superior service. It found that this service would be more expeditious than less-than-carload rail service (R. 37), and subsidiary findings establish how markedly superior his service would be in this respect. The Commission found that, on l. c. l. (less-than-carload) rail shipments from Vermont, the transit time to a St. Paul, Minn., dealer is 3½ to 6 weeks (R. 30); to a Rockford, Ill., dealer 3 to 5 weeks (R. 32); to an Aberdeen, S. D., dealer about 17 days (R. 31); and to the 16 western states generally, 2 weeks on the average (R. 34). It also found that Schaffer proposed to transport to points in these states in 5 to 8 days (R. 28).[6]

The fact, as found by Division 5, that, "in the main", rail carload service is "satisfactory" (R. 21) is immaterial. The public convenience and necessity of Schaffer's proposed motor service depends upon the advantages which it offers over the service with which it is competitive—less-than-carload rail service. As shown above, for those who ship in l. c. l. quantities, his service would cut transit time fifty percent or more.

The Commission did not find, nor does the evidence furnish any basis for a finding, that shippers are not materially concerned with the time required to transport from manufacturer to dealer. On the contrary, the Commission found that every shipper witness, whether manufacturer or dealer, complained that "rail service is too slow" (R. 37). The importance

[6] Schaffer testified that he expected to transport to the points in these states in 4 to 7 or 8 days (R. 68).

of this factor to shippers is further shown by the findings of Division 5 that more prompt and reliable delivery time would enable dealers to maintain smaller inventories and to meet the deadlines of their customers, and would enable manufacturers to compete more successfully with other monument manufacturers having truck service from manufacturer to dealer (R. 22).[7] A Vermont manufacturer who ships annually 1,600,000 pounds into the 16 western states covered by Schaffer's application testified, in answer to a question as to the advantage of speedy delivery to customers, that "our business is seasonal" and that certainly in the spring "every day counts from a dealer point of view" (R. 229).[8] The field representative of the association representing 67 Vermont manufacturers in traffic and shipping matters testified that "people seem to take a long time to buy them [monuments], and once they buy them, they want them in a hurry", and that speedy transportation is important because otherwise retail monument dealers will in many cases "switch their customers to other granites" (R. 133).

Not only are shippers concerned with obtaining the speedier transportation of less-than-carload shipments which Schaffer offered to provide, but shipment of granite monuments is principally in less-than-carload quantities. The South Dakota producer who supported the part of Schaffer's application relating to

[7] The full Commission, in its report, did not repudiate these findings or make inconsistent findings.

[8] The peak of the season is Memorial Day, and to a lesser extent Mother's Day and All Souls' Day (R. 78, 250).

transportation from Grant County shipped principally in less-than-carload quantities (R. 28). As to the supporting Vermont manufacturers, one had 213 dealer customers in the 16 western states involved, and 168 of these dealers, or nearly 80% of the total, bought in l. c. l. quantities (R. 253–254; App. Ex. 24, R. 332). Another shipped into these states 1,600,000 pounds annually, of which about 600,000 pounds went by l. c. l. rail, 600,000 pounds in rail "pool" cars (constituting aggregations of numerous l. c. l. shipments, R. 234), and only about 400,000 pounds, or 25%, in straight carloads (R. 241).

The Commission gave two grounds for denying Schaffer's application, (1) that l. c. l. rail service is "fairly good" and the existing rail service "reasonably adequate" and (2) that the "main purpose" of those who supported his application was to "obtain lower rates rather than improved service" (R. 37). We address ourselves to these grounds.

The Commission did not explicate what it meant by "fairly good" or "reasonably adequate", but it is unnecessary to inquire what standards were applied in making these characterizations. Under the statute, the requirements of public convenience and necessity are to be determined, not on the basis of the reasonable adequacy of the existing service, considered solely from the standpoint of the economies and practicalities of rail operations, but on the basis of whether the proposed new mode of transportation would provide superior service.

The slowness of l. c. l. rail service, as reflected in the findings and record, may well be a necessary inci-

dent to transportation, in carloads of mixed freight, to destinations requiring interchanges with other rail carriers. The relevant consideration is that the motor service which Schaffer proposed to inaugurate would be more adequate, economical, and efficient than rail less-than-carload service.[9] He would carry granite monuments exclusively, thus serving the needs of this trade, and would transport directly from manufacturer to customer.

We submit that the statutory requirements are correctly interpreted in the statement by Division 5 that "no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need", and that the public may not be deprived of a "new and improved service" merely because it diverts some traffic from the carriers currently providing service (R. 22).

Where, as here, railroads have a monopoly of certain transportation and the proposal is to provide significantly better transportation service by means of trucks, denial of the proposed service on the ground that the existing rail service is "reasonably adequate" conflicts with the direction to the Commission, embodied in the National Transportation Policy declared by Congress, that it administer the Act so as to recognize and preserve the "inherent advantages" of each

[9] His service, in addition to its greater speed, would require less crating, would eliminate the inconvenience and expense to the receiver incident to obtaining delivery when he is not located on a railroad siding or in a town with railroad service, and was expected to result in less damage to merchandise while in transit. See findings of Division 5 (R. 21-22), which the full Commission did not directly or indirectly reject.

mode of transportation, rail, motor, and water. Such action does not recognize and preserve the advantages inherent in the proposed truck service. Rather, it maintains the *dis*advantages, not the advantages, inhering in the mode of transportation first in the field.

In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, the Court invalidated an order of the Commission which approved higher rail rates for the transportation of grain east of Chicago if it had arrived at Chicago by barge rather than by rail, and held that the National Transportation Policy, as well as other provisions of the Act, forbade this discrimination. The Court said that Congress "left the Commission no discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part." 330 U. S. at 579.

Dixie Carriers, Inc. v. *United States*, 351 U. S. 56, held that, when the railroads had established and were maintaining a through route and joint rate for all-rail traffic between certain points, the Commission erred in refusing to establish a through route and a joint rate for rail-barge traffic between the same points, because shippers were thereby denied the "inherent advantages" of water transportation. The Court pointed out that the statute required the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest", and it said that the guide to the Commission's action is the public interest "as defined in the Act." 351 U. S. at 60. The Court further held that the "public interest" as so defined includes administration

of the Act so as to preserve the "inherent advantages" of water transportation and the lower cost of this particular mode of transportation. 351 U. S. at 60–61.

The Commission's second ground for rejecting Schaffer's application was the equivocal finding that the evidence "indicates" that those supporting the application had as their main objective obtaining lower rates rather than improved service.[10] We believe this clearly to be an unsound ground of rejection. An improved service is scarcely less advantageous to the public because it additionally gives shippers the advantage of lower rates. The lower-rate advantage does not cancel out, or otherwise qualify, the improved-service advantage.

Aside from the foregoing, we submit that the Commission misinterpreted the statutory test when it ruled that the lower cost of Schaffer's proposed service "is not a proper basis for a grant of [operating] authority" (R. 37). Irrespective of whether the prospect of lower rates tends to show public convenience and necessity when a motor carrier seeks to enter a field already served by one or more motor carriers, a lower-cost motor service for shippers having solely rail service is a matter of "public convenience and necessity" as that phrase is "defined in the Act" by the directions and mandates of the National Transportation Policy. *Dixie Carriers* held that the lower cost of water transportation as compared with rail transpor-

[10] Division 5, on the same evidence, found that all the shippers and receivers who appeared as witnesses were agreed that the rail less-than-carload service was entirely inadequate "not only from the standpoint of cost, but also and primarily from a service standpoint" (R. 21).

tation is an inherent advantage of the former mode of transportation and, in view of the mandates of the National Transportation Policy, may not be denied to shippers where the statutory test to be applied is "necessary or desirable in the public interest." So here, motor transportation, if its cost be lower than transportation by rail, is an advantage inhering in the different mode of transportation, and this inherent advantage may not be denied to shippers under the statutory standard of "public convenience and necessity."

The motion to affirm which the Commission filed in this case stated (p. 4): "The Commission has consistently refused to consider the issue of rates as pertinent in proceedings for operating authority since that is a matter for which other sections of the Interstate Commerce Act provide a remedy." But the remedy elsewhere provided in the Act, prescription of maximum reasonable rates, provides no effective remedy when the only available service is rail service. In that situation, the reasonableness of the rates charged by the presently operating carriers necessarily is measured exclusively by the operating conditions and economics of rail transportation. To the extent that these rates are above the rates which a motor carrier, conducting an altogether different type of operation, might reasonably charge, the public is denied the "economical" and "efficient" service to which it is entitled, and it is denied an advantage inhering in a different mode of transportation. Moreover, five of

the six rulings which the Commission cited as showing its consistent refusal to grant a motor carrier new operating authority on the basis of proposed lower rates are not in point since they involved applications to provide service which other motor carriers were already providing.[11] In the one exception, *Youngblood Extension of Operations—Canton, N. C.*, 8 M. C. C. 193, while the only existing service was rail (8 M. C. C. 195), other motor carriers opposed the application (8 M. C. C. 193–194).

The National Transportation Policy provides for administration of the Act to the end of developing and preserving a national transportation system "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." Accordingly, an application by a motor carrier for operating authority may properly be rejected if it appears that grant of the application would make such inroads on the traffic and revenue of the existing carriers that their ability to serve the needs of commerce, the postal service, and the national defense would be impaired. In the present case, however, not only was there no showing of the revenues received by the railroads from transportation of granite, but no estimate was made of the

[11] *Wellspeak. Common Carrier Application*, 1 M. C. C. 712, 714; *Johnson Common Carrier Application*, 18 M. C. C. 194, 195–196; *Black Extension of Operations—Prefabricated Houses*, 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products*, 51 M. C. C. 343, 347–348, 350; *Omaha & C. B. Ry. & Bridge Co. Common Carrier App.*, 52 M. C. C. 207, 235.

probable revenue loss should Schaffer's application be granted. In any event, it is plain that the revenue loss could not possibly have any appreciable adverse effect upon the railroads concerned. See Appellants' Brief, p. 20.

The emphasis which we have given to the National Transportation Policy not only accords with the interpretation placed on that policy by this Court (see *supra*, pp. 18-19), but also with the basic purpose of Congress as reflected in the legislative history. The last sentence of the declaration, "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy", was adopted through an amendment offered from the floor of the House. 84 Cong. Rec. 9861, 9866. In a detailed study of the policy declaration, it has been said that the intention of the proponents of this amendment was that "in any apparent conflict between the specific provisions of the Act and the declaration of general purposes in the National Transportation Policy, the latter should be the lodestar in seeking the meaning of the words of Congress." Oppenheim, *The National Transportation Policy and Inter-Carrier Competitive Rates* (1945), p. 13. For a summary of the relevant legislative materials, see *id*, chapter I; *Interstate Commerce Commission* v. *Mechling, supra*, 330 U. S. at 575–576; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 697–701 (dissenting opinion of Mr. Justice Black).

CONCLUSION

The judgment of the district court should be reversed, with directions to set aside the order of the Commission and to remand the case to it for further proceedings not inconsistent therewith.

Respectfully submitted.

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vantages" of water transportation. The Court, after pointing out that the statute required the Commission to establish through routes and joint rates "whenever deemed by it to be necessary or desirable in the public interest", said: "The public interest, as defined in the Act, is the guide to the Commission's action". The "public interest" as so defined included administration of the Act so as to preserve the "inherent advantages" of each mode of transportation subject to regulation. 351 U. S. 60-61.

The Interstate Commerce Commission in its motion to affirm states (p. 3) that the Commission's determination was based upon "the adequacy of existing rail *and* motor carrier service". We doubt that this is a proper construction of the Commission's action. Aside from the operating authority denied by Division 5 and not in issue in this proceeding, nowhere in the Commission's report is there a finding of available motor service, and Division 5 categorically found to the contrary (J. S. 46). The fact (see Comm. Motion, p. 4) that several supporting witnesses had failed to investigate the availability of motor carrier service is, we believe, without significance. The four witnesses in question were dealers in the midwest receiving shipments from Vermont[3] and, as the Commission itself found, "consignees ordinarily leave the routing to the producers" (J. S. 52). The Commission's report discloses no such statement by those who testified on behalf of actual Vermont shippers, one of whom shipped annually 1,600,000 pounds (J. S. 59) and another over 5,000,000 pounds (J. S. 61), or on behalf of the trade association

[3] The combined annual receipts of the four dealers ranged from 115,00. to 140,000 pounds (J.S. 56-58).

which arranged pool car shipments for its many manufacturer members (J. S. 62).

The appeal, in our view, presents the question whether there has been an erroneous application of the statute which tends to thwart one of its basic purposes—that the public be given opportunity to choose between different media of transportation, at least to the extent that the services of any particular medium provide unique or special advantages. It appears that until recently the Commission itself had adhered to the principle that the existence of adequate rail service is insufficient ground for denying to a motor carrier authority to serve the same area, and that shippers are entitled to a choice between rail and motor carrier service. See J. S. 9-11; Hearings before the Select Committee on Small Business, United States Senate, 84th Cong., 1st sess., relating to ICC Administration of the Motor Carrier Act, pp. 139-140.

In the district court, the United States supported the Commission's order. On further analysis of the facts and issues, the Government has concluded that the order probably is erroneous and that summary affirmance is not warranted.

Respectfully submitted,

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NOVEMBER 1956.

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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1957

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
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Department of Justice, Washington 25, D. C.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 359–369) is reported in 139 F. Supp. 444.

JURISDICTION

Final judgment of a three-judge district court was entered on May 25, 1956 (R. 373). Notice of appeal was filed on July 19, 1956 (R. 370). Probable jurisdiction was noted on December 3, 1956 (R. 372). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

QUESTION PRESENTED

Whether the Interstate Commerce Commission, in rejecting Shaffer's application for authority to provide a motor service superior to the rail service which alone was available to shippers, misinterpreted the "public convenience and necessity" criterion of Section 207 (a) of the Interstate Commerce Act, in that it failed to administer that section (as required by the National Transportation Policy) so as to recognize and preserve the "inherent advantages" of the proposed motor transportation.

STATUTE INVOLVED

The declaration of national transportation policy, incorporated in the Interstate Commerce Act by the Transportation Act of 1940, 54 Stat. 899 (49 U. S. C., notes preceding Secs. 1, 301, 901); provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a na-

tional transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Part II of the Interstate Commerce Act, entitled "Motor Carriers", provides in part as follows:

SEC. 206. (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * *, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *. [49 U. S. C. 306 (a) (1).]

* * * * *

SEC. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *. [49 U. S. C. 307 (a).]

STATEMENT

A. W. Schaffer, doing business as Schaffer Transportation Company (Schaffer), holds a certificate of public convenience and necessity authorizing him to transport granite over irregular routes as a common carrier by motor from Grant County, South Dakota, to points in 15 states, including Pennsylvania and New York (R. 290). He filed with the Interstate Commerce Commission an application for a certificate authorizing him to transport granite over irregular routes as a common carrier by motor (1) from Grant County to points in 10 additional states and the District of Columbia, and (2) from points in Vermont to a block of 16 states lying west of the Mississippi River and bounded on the west by Montana, Wyoming, Colorado, and Texas (R. 7; Appl. Exs. 4–5, R. 294–296). The Commission entered an order denying Schaffer's application and the district court dismissed his suit to have this order set aside (R. 38, 369–370).

The following are among the findings of fact made by the Commission.

At present, Schaffer is transporting granite for the Dakota Granite Company. This company has quarries in Grant County at which it finishes granite into monuments, mausoleums, and building forms, which it ships to retail outlets by rail (principally in less than carload quantities) and by truck. It ships by Schaffer's trucks two or three times a week and finds his service very satisfactory. The customers pay the freight charges and have the privilege of designating the carrier to be used. In most instances, they re-

quest shipment by motor, principally because truck rates are lower than l. c. l. (less-than-carload) rail rates, but also because truck shipments arrive "in shorter time and usually without being damaged." The company itself also prefers to use Schaffer's service, rather than rail, because "the cost of cartage to the rail siding (6½ miles distant) is eliminated, and the crating of the monuments need not be so thorough." The company has orders on file from customers in states to which Schaffer wishes to transport from Grant County, and all of these customers had requested delivery by motor. (R. 28–29.)

Schaffer is at present transporting one load a week from Grant County to New York and Pennsylvania points, and the trucks making these deliveries frequently return empty. If the requested authority to transport from Vermont is granted, Schaffer proposes to station a dispatcher and several pieces of equipment at Barre or Montpelier, Vermont, and perform a "shuttle" service between the South Dakota and Vermont origins. Vehicles which he uses in transporting shipments from Grant County to certain eastern destinations would be "deadheaded" to the Vermont origin area to pick up westbound traffic. Schaffer owns 14 tractor-trailer units, six of which he uses exclusively for moving granite. (R. 27–28.)

Schaffer's application for authority to transport from Grant County to additional destination areas was supported by the Grant County manufacturer whom he now serves (R. 28–29, 85–122). The part of his application relating to transportation from

Vermont to 16 western states was supported by six monument dealers (R. 29–32, 74–85, 135–177);[1] by two monument manufacturers in the Barre, Vermont, producing area who together ship annually 6,600,000 pounds into the 16 states involved (R. 32–35, 222–263); and by a trade association which has 67 Barre-area granite manufacturer members and which represents its members in traffic and shipping matters (R. 35, 122–135, 264–279).

With respect to the issues presented on this appeal, the only opposition witnesses were representatives of three railroads.[2] The railroad evidence showed the following:

Dakota Granite Company is located at a town on the line of the Chicago, Milwaukee, St. Paul & Pacific, and this railroad interchanges freight with lines serving southwestern points and lines serving the Barre area (R. 200–202). The Texas & New Orleans interchanges freight with lines serving both South Dakota and Vermont, and it offers a supplemental truck service in Texas and Louisiana (R. 203; Interv. Ex. 15, R. 318). The Central Vermont Railway has stations

[1] The supporting dealers were located in Illinois, Kansas, Minnesota, Missouri, Nebraska, and South Dakota (R. 29–32).

[2] Schaffer's application was opposed by a motor carrier holding a certificate authorizing transportation of granite from Grant County to four of the states and the District of Columbia embraced in the part of Schaffer's application relating to shipments from Grant County (R. 36, 179–199; Interv. Exs. 10–11, R. 307–311). But the order entered by Division 5 of the Commission denied Schaffer's application to the extent that it was thus opposed (R. 21–24), and Schaffer did not request reconsideration of the order of Division 5 (R. 25). This aspect of his application is therefore no longer in issue.

in the Barre area; shipments of granite from that area are substantial and regular and the road is able to handle additional traffic; through routes and rates are in effect over connecting lines to the 16 western states included in Schaffer's application; grant of this application would adversely affect the railroad; and there is motor carrier competition as to shipments of granite (R. 280–282).[3]

The Examiner who heard the evidence recommended that Schaffer's application be granted (R. 344–358). Division 5 found, with one Commissioner dissenting, that Schaffer is fit, willing, and able properly to perform the service proposed and that public convenience and necessity require this service, except for transportation from Grant County to the four eastern states and the District of Columbia served, or which might be served, by an existing motor carrier

[3] The testimony was merely that the railroad had motor carrier competition, without specifying to what destination areas there was such competition (R. 281). (For example, there was motor service to New York and Pennsylvania points, R. 233.) On cross-examination, the witness admitted that, to his knowledge, no motor carrier transported granite from Vermont to any of the 16 western states; that he did not know of a single pound of granite shipped to these states, lost by the railroad by reason of motor carrier competition; that he knew that one motor carrier transported to the Buffalo area and had learned, from reading the transcript of another proceeding, that this carrier interchanged freight to points in Illinois and Ohio (R. 283–285).

The District Supervisor of the Interstate Commerce Commission's Bureau of Motor Carriers advised the trade association of Vermont manufacturers that he was not aware of any through truck service to midwestern states (R. 272–273).

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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September 1957.

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BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the District Court (R. 359–369) is reported in 139 F. Supp. 444. The report of the Commission on reconsideration (R. 24–38) dated February 7, 1955, is reported at 63 M. C. C. 247.

JURISDICTION

The final judgment of the three-judge district court was entered on May 25, 1956 (R. 369). Notice of appeal was filed on July 19, 1956 (R. 370). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

1. Whether the Commission's finding that the public convenience and necessity does not require the proposed motor carrier service is supported by substantial evidence.

2. Whether the Commission's denial of an application for a motor carrier certificate of public convenience and necessity violates the National Transportation Policy because the Commission took into account, among other factors, the adequacy of the existing railroad service.

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act are set forth in the Appendix, infra, pp. 42–43.

STATEMENT

Proceedings before the Commission

This is a direct appeal from a final judgment entered May 25, 1956, by a three-judge district court dismissing a suit seeking to set aside an order of the Interstate Commerce Commission. The Commission's order denied the application of A. W. Schaffer, d. b. a. Schaffer Transp. Co., hereinafter called Schaffer, for a certificate of public convenience and necessity pursuant to the provisions of section 207 (a) of the Act, see Appendix A, pp. 42–43.

On May 28, 1951, Schaffer filed an application for a certificate of public convenience and necessity authorizing operation in interstate commerce as a com-

mon carrier by motor vehicle of granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont; Texas, Arkansas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes (R. 7, 25).

Protests against the application were filed by rail carriers and thereafter the matter was assigned for hearing before an examiner. Two hearings were held, the first at St. Paul, Minn., on June 13, 1952, and the second on December 2, 1952, at Washington, D. C. (R. 344, 345). At the first hearing, William Dingmann d/b/a Granite City Transfer of St. Cloud, Minn., hereinafter called Dingmann, appeared in opposition to the application in addition to the protesting rail carriers R. 179–199).

On February 10, 1952, the examiner issued his report and recommended order granting the application in part (R. 357–358). After exceptions and reply to the examiner's report were filed, the Commission, Division 5, with one member dissenting, issued its report and order decided May 24, 1954 (R. 6–24). The order of the Commission, Division 5, granted the application for service from (1) points in Grant County, South Dakota, to points in Wyoming, North Dakota, Texas, Arkansas,

Louisiana and West Virginia, and (2) from points in Washington and Orange Counties, Vermont, to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas and Louisiana. It denied authority to Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia (R. 22–23). Petitions for reconsideration were filed, and by order of the Commission, Division 5, entered November 12, 1954, granting the petitions for reconsideration, and it reopened the proceeding for reconsideration on the present record.

Upon the granting of petitions for reconsideration, the full Commission assumed jurisdiction of the proceeding (R. 25), and on February 7, 1954, it entered its order with accompanying report denying the application, four Commissioners dissenting (R. 24–38). On May 16, 1955, the Commission issued an order permitting the intervention of certain parties and denying the petitions for further reconsideration and oral argument (R. 39–40).

The report and order of the Commission entered February 7, 1954, denying the application, were challenged by the appellants in the district court, which in an opinion dated March 13, 1956, unanimously upheld the action of the Commission (R. 359–369).[1]

[1] In the district court the United States joined the Commission in defense of its orders.

SUMMARY OF ARGUMENT

The Interstate Commerce Act, Part II, authorizes the Commission in its discretion to grant certificates of public convenience and necessity to common carriers by motor vehicles. Section 207 (a) authorizes the Commission to grant certificates of public convenience and necessity to qualified applicants desiring to perform transportation in interstate commerce provided that the Commission finds, among other things, that the proposed service is required by the present or future public convenience and necessity. Otherwise the application shall be denied.

The Commission in the instant proceeding found that public convenience and necessity did not require the proposed operation and accordingly denied the application. The Commission exercises broad and exclusive administrative discretion in determining public convenience and necessity. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, 42. It is the Commission's duty "* * * not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241.

The Commission in denying the application for a certificate of public convenience and necessity did so on the ground that the applicant failed to sustain the

burden of proof that a public need existed for the the proposed service.

Underlying the ultimate conclusions was the fact that the evidence of record showed that the shippers supporting the application were motivated by a desire for lower rates rather than a need for additional or better service which could not be provided by existing transportation facilities. The desire to obtain lower rates cannot be considered as controlling in an inquiry to determine public convenience and necessity under section 207 (a) of the Act, 49 U. S. C. 307 (a). *American Trucking Assn's.* v. *United States,* 326 U. S. 77; *Youngblood Extension of Operations—Canton, N. C.,* 8 M. C. C. 193.

II

Whether the Commission can consider the adequacy of existing rail service to handle the transportation requirements of shippers, where the basic element of a need for the proposed motor carrier service has been established is not properly before the Court on appeal. However the National Transportation Policy, on its face, requires the Commission to consider the effect of its determinations in proceedings involving certificates of public convenience upon competing forms of service for the purpose of fostering "* * * sound economic conditions in transportation and among the several carriers * * * all to the end of developing, coordinating, and preserving a national transportation system. * * *" The failure

of the Commission to consider its actions in the light of all of the terms of the National Transportation Policy would be contrary to the mandate of Congress. The direction to the Commission that it must administer the Act to preserve the inherent advantages of each mode of transportation is not designed to favor one mode over another, but to preserve the inherent advantages of all. The Commission must consider the adequacy of existing rail carrier service where the rail carriers are parties in interest and have standing to sue. *Alton Railroad Co.* v. *United States,* 315 U. S. 15. The Commission's action in the premises is in accord with the provisions of the National Transportation Policy.

ARGUMENT

I

The order of the Commission denying the application for a certificate of public convenience and necessity is predicated upon substantial evidence of record and complies with the applicable provisions of the Interstate Commerce Act

(a) The Commission exercises broad and exclusive administrative discretion in determining public convenience and necessity

The nature and extent of the power vested by Congress in the Commission in matters arising under section 207 (a) of the Act, such as the instant appeal, has been the subject of considerable litigation, extensive judicial analysis and is well settled. Antecedent to the enactment of part II of the Interstate Commerce Act, judicial determination of the Commission's power under section 1 (18) of the Act (49 U. S. C.

sec. 1 (18)), involving applications for certificates of public convenience and necessity, and abandonment of rail lines by rail carriers constituted the precedents for later judicial interpretations of the Commission's power under section 207 (a) of the Act. In *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42, the court held:

> There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question.

See also *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273; *Colorado* v. *United States*, 271 U. S. 153, 168; *Powell* v. *United States*, 300 U. S. 276, 287.

In *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65, the Court had under consideration an order of the Commission granting a certificate to a wholly owned motor carrier subsidiary of a rail carrier. Basing his opinion upon the court's prior experience reviewing the Commission's discretionary power under section 1 (18) and (20) of the Act, 49 U. S. C. sec. 1 (18), (20), Justice Reed said, at p. 65:

> Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of the government in the regulation of transportation. When Con-

gress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same Act since the Transportation Act of 1920, section 402 (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35, 42. Cf. *Gray* v. *Powell*, 314 U. S. 402, 411–12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service would serve public convenience and necessity. Cf. *Powell* v. *United States*, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * *.

The Court, during the same term, considered a similar question concerning the Commission's scope of authority in granting or denying certificates of public convenience and necessity under the water carrier provisions of the Act, 49 U. S. C. sec. 909 (c). In *United*

States v. *Detroit Navigation Co.*, 326 U. S. 236, Justice Douglas stated at p. 241:

> * * * The Commission is the guardian of the public interest in determining whether certificates of public convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35, 42; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here.

The holding of the Court in the *Detroit Navigation Co.* case, *supra*, further emphasizes the broad administrative discretion vested in the Commission in

matters involving the public convenience and necessity with respect to additional transportation. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158; *Capital Transit Co.* v. *United States*, 97 F. Supp. 614; *St. Johnsbury Trucking Co.* v. *United States*, 99 F. Supp. 977, 981; *A. B. & C. Motor Transp. Co.* v. *United States*, 69 F. Supp. 166, 167. In *Wales* v. *United States*, 108 F. Supp. 928, 932, affirmed per curiam 345 U. S. 954, the court said:

> We do not understand that the words, "convenience", and "necessity," are to be bounded and limited by any authority, save and except the Interstate Commerce Commission. * * *.

We submit that the Commission's order was made in conformity with the criteria sanctioned by the decisions of the courts noted above. The Commission, after extensive hearings and consideration of the matter over a period of approximately four years, after analysis of the large record and the many exhibits, properly exercised its administrative discretion when it found that public convenience and necessity did not require the proposed operation. This determination, supported by substantial evidence of record, was sustained by the district court (R. 362, 367), *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547–548; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146, and for the same reason the judgment of that court should be affirmed.

(b) The evidence adequately supports the findings of fact and the conclusions arrived at by the Commission

The Commission stated its conclusions (R. 37) as follows:

> On the foregoing facts, we are unable to conclude that the public convenience and necessity require the proposed operation. It is seen that for one reason or another the supporting witnesses find fault with the presently utilized rail service. Actually, however, the evidence warrants the conclusion that the witnesses are reasonably satisfied with rail service except for the one complaint that all share, namely, that rail service is too slow. Nevertheless, it is the practice for the Vermont shippers to hold finished granite until they can accumulate a pool-car load in order that the shipments may move at the lower pool-car rate. This practice is followed with the knowledge and consent of the consignees, and the sole purpose therein is to take advantage of the lower rail rate. Less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses. The testimony of the South Dakota shipper also indicates that its support of the application is largely motivated by anticipated cheaper transportation.
>
> We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain lower rates rather

than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied.

All of the contentions of the parties have been considered even though not specifically discussed. In view of our conclusions herein it is unnecessary to consider the question of applicant's fitness to conduct the proposed service.

The evidence adduced before the Commission adequately supports the conclusions set forth above. There are two operations involved in Schaffer's application: (1) the eastbound and southern movement, and (2) the westbound movement from points in Vermont to points in 16 states (R. 24–25). We shall consider initially the evidence offered in support of the eastbound and southern movement.

1. The eastbound and southern movement

The report of the Commission sets forth the findings of fact (R. 28–29) regarding the *single* shipper witness desiring motor carrier service from Grant County, S. Dak., to points in the New England States, Texas, Arkansas, North Dakota and West Virginia.

The appellants concede that insofar as the order of Division 5 of the Commission denies (R. 22–23) the application with respect to service to Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia, the existing motor carrier service is adequate (Appellants' br. p. 3; br. of United States p. 6). However, the Commission upon reconsideration went into every aspect of the record before rendering its final decision. The mere fact that the Commission

changed its mind upon reconsideration does not constitute reversable error. *Beard-Laney* v. *United States*, 83 F. Supp. 27, 33, aff'd per curiam 338 U. S. 803.

The paucity of evidence indicating a need for the proposed service on the eastbound and southern movement is exemplified by the testimony of the shipper from Milbank, S. Dak. (R. 85). He pointed out that very little granite is shipped into Vermont (R. 87); that he would use the service into Connecticut about seven times a year; and that with respect to Texas "* * * for the next year we wouldn't use it very often * * *" (R. 92).

Although he mentioned that he had salesmen in Arkansas, North Dakota and West Virginia, and that he had some orders on file from these states (R. 91) his testimony is devoid of any evidence of the amount of traffic and the transportation requirements into these states. In addition, no evidence at all was adduced with respect to Maryland, Louisiana, Wyoming and the District of Columbia, the other points desired to be served by Schaffer. The Commission in its report found with respect to the use made of presently available motor carriers that "It has not used the service of Dingmann [motor carrier opposing application] in the past two years primarily because of rate considerations * * *" (R. 29). Rather than take advantage of the existing motor carrier service, this shipper relied upon carload rail transportation (R. 95). The inference that the question of rates, rather than need, determines the mode of transportation to

be used is solidified by the following colloquy (R. 98–99), regarding truckload or split delivery service to points in the eastern states:

> A. I would have to qualify that statement. I would have to be able to consider the *rates* on that split shipment, because the majority or practically all of our shipments into that area, since it is so close to Berry [Barre], are small shipments, split shipments, and although the stops might only be ten miles apart, those *rates* will have to be fairly competitive, because they will be competing with granite from the Berry [Barre] area.
>
> Q. In other words, as I construe your answer, such a service would meet your requirements with the qualification that the *rates* might seem too high in split deliveries, is that your answer?
>
> A. I would have to qualify that, too. If we could expect service when we called for a truck and if the *rates* were competitive with rail *rates* and other types of carrier rates or carload, pool carload to Chicago rates, I would say it may meet our needs. [Emphasis supplied.]

This is further emphasized by the shipper testimony (R. 105) that he would not use Dingmann's service under the present tariff despite the similarity of services and facilities with that of Schaffer. Plainly this shipper who acknowledges no complaint regarding existing service (R. 97–98) desired Schaffer's service merely because of the opportunity to obtain a lower rate.

2. The westbound movement

The Commission (R. 29–35) states its findings of fact drawn from the evidence adduced by shipper witnesses interested in the westbound movement of the application. Their testimony shows a substantial accord with that of the witness representing the shipper supporting the eastbound movement in that their desire for the proposed service is motivated primarily by the hope of obtaining lower rates.

Several monument dealers located in the midwest appeared on behalf of the application for authority to transport rough and finished granite from Vermont. Osborne-Peterson, Inc., of St. Paul, Minn., fabricates and letters monuments and markers which it sells at retail (R. 74–75). It receives granite from Barre, Vt., primarily in rail carload shipments (R. 75). Although the shipper states that it desires expedited service (R. 80), apparently the present service is suitable since it does not take advantage of the faster less-than-carload movement. However, it would rather delay its shipments for the accummulation of sufficient freight to make up a pool car (R. 75). With respect to the use he would make of the proposed service, he stated that "* * * perhaps a half a dozen times a year" (R. 76, 83). He intended to use the service sometimes in complete truckload movements and sometimes for one unusual marker of "perhaps two or three monuments" (R. 83–85). The shipper does not propose to ship all of its granite by truck (R. 81), but intends to continue using rail carload service (R. 75). The witness also pointed out

that his business is seasonal and that from November to April business is quiet (R. 78).

McCarty Memorials of Hutchinson, Kans., engages in the sale of public and private memorials. It purchases mostly finished monuments and markers (R. 135–136). At the present time it utilizes rail service from Barre, Vt., to Kansas City, Kans., and motor carrier service from the latter city to its place of business (R. 136). The amount of granite it receives a year from Barre is only about six less-than-carload shipments, approximating about a carload a year (R. 137, 144). The less-than-carload shipments amount to a maximum of 3,000 pounds each (R. 137). In answer to a question as to whether he would have used motor carrier service if it had been available, he stated, "Not necessarily" (R. 137). Service by rail from Barre takes only 14 to 21 days (R. 139–140). He has never requested any motor carrier service from Barre nor has he made a survey as to those available (R. 144). McCarty is aware that Schaffer would have to solicit additional traffic for a truckload from other dealers in his area in order to serve him (R. 145–146). Despite the so-called need for the applicant's expedited service, McCarty would not carry a reduced inventory of Vermont granite (R. 149).

The testimony of Norris E. Walther, who is in the retail monument business at Fremont, Nebr., (R. 149–150) is similar to McCarty's except that he would have a smaller volume of traffic (R. 155). He explained that one of the major reasons for supporting

the applications was the possibility of a low rate (R. 151). At the present time, he has motor carrier service from Milbank, S. Dak., and from Cold Spring and St. Cloud, Minn. while this shipper has "wondered" about motor carrier service from Barre, he appears to have made no investigation of the availability of such transportation (R. 152, 156).

Paul Stevenson of Moberly, Mo., a retail monument dealer uses rail service almost exclusively from Barre (R. 158). He receives about two to three pool carload shipments a year and finds the service good (R. 159). He has experienced no delay in such service (R. 160). This shipper apparently finds no pressing need for the proposed service because he only "thought" that he needed the additional transportation (R. 159). Although he has received shipments by interline motor carrier service from the "Twin Cities" he complained of the high rate (R. 162).

Ed Hunstad of Aberdeen, S. Dak., engages in the retail monument business (R. 165). He has received rail shipments in less-than-carload lots in 17 days from Barre (R. 166). The shipper obtains about 25,000 to 30,000 pounds of granite a year from Barre (R. 167). In order to use applicant's service, he would have to allow his shipments to accumulate with that of other dealers located in his area in order to obtain split-delivery truckload service (R. 168). This method is similar to that followed by the rails in accumulating pool carloads in order to benefit from the lower rates. While this shipper expresses a need for fast service, at the present time, when requesting

transportation, he specifies, "the fastest and *cheapest* route" (R. 169). [Emphasis supplied.]

Richard C. Farrell of Loves Park, Ill., is the last shipper located in the vast territory plaintiff seeks to serve from Vermont. He is a retail dealer in monuments (R. 169). He purchases only about 20,000 to 25,000 pounds of granite a year from Barre, which is received in less-than-carload shipments (R. 170). In ordering granite from Barre he specifies the "speediest" delivery (R. 173). However, he does not intend to transfer all of his shipments from rail to motor carrier transportation since in some cases speed is not essential (R. 177).

Two shippers of Barre, Vt., engaged in the quarrying of granite and in the manufacture of markers and monuments appeared on behalf of the proposed service. Jones Brothers Company and Rock of Ages Corporation at the present time utilize rail service primarily for their transportation needs (R. 224, 249). While the witnesses for the shippers testified that there was a pressing need for Schaffer's motor carrier service, it is apparent that they do not utilize the expedited less-than-carload rail service which is available daily (R. 260) because of the single motivating factor, higher *rates*.

Witness Heber England, representing Jones Brothers Company, made the following illuminating remarks concerning Exhibit No. 23 (R. 330–332), listing the transit time of pool-car shipments (R. 240):

> Q. Will you turn to Exhibit No. 23, Mr. England?
>
> A. Yes.

Q. On that first shipment which was furnished on March 22, 1951, and was not shipped until May 14, 1951, that could have gone out on the 22nd of March, could it not, via rail less than carload?

A. Yes.

Q. The reason it was held was to take advantage of the pool car rate?

A. Yes.

Q. And the same applies to every other shipment?

A. I believe so.

Q. So that where the two factors have to be weighed, transit time and the rate, isn't it true that the rate governs?

A. No, not necessarily. I think a dealer, if he possibly can, will instruct us to hold the shipment until it can get into a pool car because of the *rate*.

Q. Yes, sir. That is customary, is it not?

A. Yes. [Emphasis supplied.]

Nelson P. Wright, appearing for the Rock of Ages Corporation, testified similarly (R. 257). He stated:

Q. And you hold those shipments for pool car movement to get the advantage of the pool car *rate*?

A. Yes. [Emphasis supplied.]

and at (R. 260):

Q. If you hold shipments for pool car movement for a week to thirty days where you have the opportunity to ship daily via either the Central of Vermont Railroad or the Barre and Chelsea Railroad, is the decision to hold for the pool car movement brought about by the

cheaper pool car rate and the saving to the dealer?

A. In part, if you ship at less than carload you have to pay the higher rate and the pool car is more economical and of course a solid car is more economical. But you don't have enough weight going to the dealers in a specific area. They don't want—I should say they don't order this week and it is shipped a month later. They order this week and want it shipped next week. It may take you a while to get those orders accumulated to get enough weight for a pool car.

Q. Maybe I can shorten this up. If this applicant, Mr. Schaffer, should receive the authority that he seeks, Mr. Wright, from the Commission, and he publishes a tariff on a parity or higher than the present less than carload rail rate, you can't give him any business, can you?

A. Frankly, a dealer can control that. Our dealers seem to be mostly concerned with getting quicker delivery.

Q. If they order quicker delivery, do you hold shipments thirty days when you can ship every day in less than carload lots?

A. If you ship in less than carload delivery, it will cost a lot more than it will in pool car.

Assuming that these witnesses were concerned only with the need for expedited motor carrier service, their testimony, while interesting, can be accorded very little weight, because it is the consignees who pay the charges and control and specify the method of transportation and routing, rather than the manufacturers (R. 237, 259). The terms of shipment are

f. o. b. origin (R. 241, 259). Although the two Vermont witnesses complained of lack of motor carrier service, their testimony showed the use of such service to points in New England, New York, Pennsylvania, and New Jersey (R. 225, 251, 257). There was no attempt made to use motor carrier interline service from the above states to points in the states named in the application (R. 238, 258). It is rather surprising to note that of the 800 tons of shipments made by Jones Brothers Company to points in the states requested to be served by applicant, only 300 tons move in less-than-carload shipments which might be made available for motor carrier transportation. The 300 tons broken down for daily shipment would amount to about 1½ tons (R. 232). It is evident that such a small amount of tonnage daily would not warrant applicant's deadhead operation from points such as West Virginia. The examiner who heard the case asked whether or not the shipper would consolidate these shipments into weekly movements or was the shipper expecting daily outbound transporation. The witness, Mr. England, evaded direct answer to this question by merely stating, "From our point of view we would like to have them out each day; and the dealer would like them each day." (R. 232). Obviously, no motor carrier could stay in business very long on that type of operation. However, despite the claims and contentions made by the shippers from Vermont, there is no assurance that applicant would get any of the traffic from Barre unless he was able to provide an advantageous rate. At R. 261, the testimony of Mr. Wright on this point

adequately summarizes the position of the Vermont shippers:

> Q. [By Mr. Lane] If Mr. Schaffer published a tariff with the higher rate level than the existing less-than-carload rail rate, you couldn't give him your business, could you?
>
> A. I don't think so.[2]

There remains the last witness appearing in support of the proposed service. This witness purportedly represented members of the Barre Granite Association. The Commission, in its report, stated that the association "does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members" (R. 35). This statement reflects the testimony of the witness at R. 127. The evidence offered by Richard T. McBride can only be characterized as hearsay, requiring limited weight. The following colloquy is an example of the type of information this witness offered to prove a need for Schaffer's service (R. 275–276):

> Q. I want to make this as short as possible. I don't like to prolong this record. If I asked you specific questions about these 18 manufacturers who you purport to represent with regard to destination, tonnage to specific destinations, methods of transportation being used at the present time, the split between pool car, full carload, and less than carload, questions of that nature, would you be able to stand cross-

[2] Schaffer planned to increase his rates (R. 111–112); thus making the possibility of attracting this traffic even more remote.

examination and answer me in a responsive manner?

A. I think I would attempt to do the best of my knowledge.

Q. Where do Cook and Watkins ship in the 16 states involved in this application?

A. I don't have that specific information.

Q. If I asked you the same question about the other 17 manufacturers, would your answer be the same?

A. Yes, I would not have that specific information.

Obviously, without this information which is pertinent to a hearing involving the granting of a certificate of public convenience and necessity, the Commission could give little weight to the hearsay information offered by this witness.

The foregoing analysis of the evidence of record concerning the supporting shippers, in addition to the carefully delineated findings of the Commission, clearly supports its ultimate conclusions. Schaffer had requested to serve 11 states on the eastbound and southern movement. However, the only shipper witness supporting this phase of the application showed at the most a speculative need based upon rates for service to points in Connecticut already served by another motor carrier. There was no other evidence adduced to show a need for service to the other 9 states and it was conjectural with respect to Texas.

The Commission has consistently stated that existing motor carriers are entitled to transport all the traffic they can handle adequately, economically and efficiently without the competition of a new motor

carrier service. *Holland Transp. Co., Inc., Extension—Massachusetts,* 33 M. C. C. 558, 560; *Thompson Extension of Operations,* 34 M. C. C. 5, 13; *Deaton Truck Lines, Inc., Common Carrier Application,* 32 M. C. C. 89, 100; *Contract Carriers, Inc., Common Carrier Application,* 41 M. C. C. 165, 170; *Santa Fe Trail Transp. Co. Extension—Joplin,* 41 M. C. C. 713; *Rock Island Motor Transit Co. Extension—Eldon, Iowa,* 33 M. C. C. 349, 357; *Clark-Callahan, Inc., Common Carrier Application,* 41 M. C. C. 693, 706; *Maner Common Carrier Application,* 42 M. C. C. 778, 787.

The mere preference or desire by the shipper for applicant's motor service over that offered by existing carriers is insufficient in the absence of evidence showing that carriers now authorized cannot or will not render a reasonably adequate service. *M. & H. Transport Service Co. Extension—Willow Run,* 47 M. C. C. 409, 412.

On the westbound movement, Schaffer sought to serve points in 16 states. Out of this vast territory only 6 witnesses appeared from specific locations in 6 states to support the application. The evidence adduced by these witnesses, as noted above and in the Commission's report, may be fairly summarized in the statement that while they desire motor carrier service they have made no effort, or very little effort, to obtain such service and if such service were available the rates to be paid for the transportation would dictate whether or not motor carrier transportation would be used. This cannot be construed in any sense

as indicating a need for additional transportation. The Commission properly concluded (R. 37):

> We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied.

The desire to obtain a lower rate cannot be considered relevant in an inquiry to resolve public convenience and necessity under section 207 (a) of the Act, 49 U. S. C. 307 (a). *Wellspeak Common Carrier Application,* 1 M. C. C. 712; *Youngblood Extension of Operations—Canton, N. C.,* 8 M. C. C. 193; *Johnson Common Carrier Application,* 18 M. C. C. 194.

The Commission has consistently refused to consider the issue of rates as pertinent in proceedings for operating authority, since that is a matter for which other sections of the Act provide a remedy. *Omaha & C. B. Ry. & Bridge Co. Common Carrier Appln.,* 52 M. C. C. 207, 235; *Black Extension of Operations—Prefabricated Houses,* 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products,* 51 M. C. C. 343, 350.

In *Roadway Express, Inc., Extension—Jamestown, Pa.,* Docket No. MC–2202 (Sub–No. 91), decided February 26, 1953, 61 M. C. C. 807 (not printed in full), the Commission, on reconsideration, stated:

> * * * If shippers believe that the rates of existing carriers are unjust and unreasonable, they have adequate means of obtaining relief under other provisions of the Act. There is nothing to indicate the nature of the transportation service available to the shipper's competitors or the extent to which the competitors ship to points in the named States; therefore the shipper's contention that it needs the proposed service to meet competition is not shown to have merit. Applicant has failed to sustain its burden of proving that there is a public need for the proposed operation and the application must be denied."

Whether the shippers find fault with the level of motor or rail carrier rates is of no moment in a proceeding involving the request for a certificate of public convenience and necessity under section 207 (a) of the Act. The law is applicable equally.

The refusal of the Commission to grant a certificate to an applicant where the evidence indicates a dissatisfaction with existing rates rather than a need for transportation service as such falls within the express declaration of the Court in *American Trucking Ass'ns.* v. *United States,* 326 U. S. 77. In that case the Court, while holding that the Commission had improperly excluded evidence, sustained the holding of the Court below [56 F. Supp. 394, 400] that the allegedly discriminatory features of the applicant's rates were not properly in issue in a certificate proceeding, since "ample administrative remedy is afforded in the shape of an application to the Com-

mission". Justice Reed stated for the Court (326 U. S. 77, at 86–87):

> * * * It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of § 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of § 220 of the same part to which the other motor carriers are subject. *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.* [Emphasis supplied.]

The converse is true where an application for a certificate finds its primary support in a mere desire for lower rates.

In *Atlanta-New Orleans Motor Freight Co., et al.* v. *United States, et al.*, U. S. D. C., N. D. Ga., Atlanta Div., 10 Federal Carrier Cases 2085, a three-judge statutory court, in upholding the Commission's determination to grant additional operating authority to a motor carrier, considered the charge made by plaintiffs that the Commission's decision was not based upon proper evidence of public convenience and necessity. The plaintiff's alleged that the record before the Commission showed that the supporting shippers were primarily concerned with obtaining lower rates. The court acknowledged that the record did contain some references to rates but at the same time stated that there was sufficient evidence of public convenience and necessity to sustain the Commission's final decision. The opinion of the court in the *At-*

lanta-New Orleans Motor Freight case, *supra,* is applicable to the proceeding before this Court because the Commission denied additional authority to Schaffer on the ground that the evidence of record indicated that the shippers were not concerned with the need for additional service, but were desirous of obtaining lower rates.

The court's statements in the *American Trucking Association* case, *supra,* and the opinion in the *Atlanta-New Orleans Motor Freight* case, *supra,* confirm and approve the Commission's long standing administrative construction of the act, under which it has consistently refused to consider the issue of rates as a factor pertinent in certificate proceedings.

Appellants contend that the Commission denied the application solely on the grounds that the existing railroad service was sufficient to meet the needs of the shippers and that there is no evidence to support the conclusion that the shippers were interested in lower rates rather than improved service. A similar charge was made by the plaintiff in *Ayer* v. *United States,* 139 F. Supp. 440. The *Ayer* case involved a review of the Commission's denial of an application by a motor carrier for a certificate of public convenience and necessity. The plaintiff in the *Ayer* case at p. 443:

> * * * urges the proposition that the denial of his certificate by the Commission was predicated on its conclusion that "the rail carriers appear to be providing the supporting shippers a reasonably adequate service and the matters complained of do not appear to be of sufficient

consequence to warrant a grant of authority herein which would undoubtedly divert considerable tonnage from the railroads"; * * *

The Commission and the United States in the *Ayer* case took the equivalent position as in this case, that there is sufficient evidence to support the Commission's findings and conclusions independent of the adequacy of existing rail service. This view was adopted by the district court even though the Commission found rail service "* * * to be 'reasonably adequate'" (p. 443–444).

A careful reading of the Commission's finding of fact, in addition to an analysis of the evidence as digested above, clearly shows adequate ground for the conclusion that the shippers were motivated in supporting the application solely to gain more advantageous rates. The evidence as shown above discloses that the shippers will continue to use rail service in very large part and that they are satisfied with such service even though to obtain a lower rate they must delay shipments for pool car movements. The record substantially supports the Commission's conclusion (R. 37) that "less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses." If the shippers were sincere in their desire for expedited transportation, the evidence should have shown a determined effort to utilize to the fullest extent possible the existing service before seeking to obtain additional competitive transportation. In this respect the record discloses

no utilization of existing interline motor carrier service. The Commission in *Pine Tree Transport, Inc., Ext.—Frozen and Canned Fruits,* 54 M. C. C. 669, 675, has said:

> * * * The shipper is not entitled as a matter of right to direct motor-carrier service to every point to which it ships when reasonably adequate interline service is available. Existing carriers have substantial investments in operating rights, facilities, and equipment necessary to institute and sustain their operations, and they are entitled to all the traffic that they can handle adequately, efficiently, and economically in the territories which they serve without the competition of an additional service. * * *.

The Commission's final conclusion in essence states that applicant failed to bear the burden of proving public convenience and necessity for the proposed service.

Essentially this is what the district court found in the instant case when it pointed out that while it might "* * * have reached a different conclusion if it had been weighing the evidence in this case * * *" (R. 368), nevertheless it held "* * * the Commission acted within the scope of its authority, that the Commission acted without abuse of its discretion, that its action was not arbitrary or capricious, and that there were adequate facts to support its findings and that its conclusions are not contrary to law" (R. 368).

In *Brooks Transp. Co., Inc.* v. *United States,* 108 F. Supp. 244, affirmed per curiam 344 U. S. 804, a

three-judge court, in dismissing a complaint brought to set aside an order of the Commission denying an application for a certificate of public convenience and necessity, posed this question at p. 248:

> Turning to a consideration of the application as one for an extension of service, it is well settled that the question on review is not whether the court would have made the same findings as the Commission on the record before it, but is: Was there a rational basis for the finding made by the Commission?

"* * * The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241. In the absence of any errors of law, and the district court so found, the orders of the Commission should be upheld, "* * * despite the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. * * *." *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547–548; *Scripps-Howard Radio* v. *Commission*, 316 U. S. 4, 10.

We submit that an examination of the report of the Commission based upon the entire record will show that it is a thoroughly considered statement of facts, and that it contains clear conclusions rationally based upon these findings of fact.

II

The Commission's order is consistent with the National Transportation Policy

As noted above, the Commission based its denial of Schaffer's application (apart from the availability of existing motor carrier service for some of the points involved) upon two factors: (1) its finding that the shippers supporting the application are primarily interested in obtaining "lower rates rather than improved service", and (2) the adequacy of the existing rail service for the particular traffic involved (R. 37). The Commission's order clearly was based upon both of these factors, and not solely upon the adequacy of the existing rail service. Accordingly, if this Court should find that the Commission's finding that the shippers were primarily concerned with lower rates is either lacking in evidentiary support or is legally insufficient, we submit that the case should be remanded to the Commission. However, if this Court sustains the Commission's finding and its relevance in determining public convenience and necessity, we contend that the adequacy of the existing railroad service was an additional factor properly to be considered by the Commission.

Initially it should be noted that the appellants, and those associated with them, make varying contentions that the Commission's decision in this case violated the National Transportation Policy. Thus, the appellant motor carrier interests assert that the question involved is whether—

> a motor carrier, in applying for operating authority pursuant to the provisions of Section 207 * * * [is] required to prove that existing rail service is inadequate.

The United States says (U. S. br. 13) that it—

> does not contend that the public convenience and necessity of a proposed motor service is established in and of itself by a showing that rail service is the sole available common carrier service. It does urge that, when railroads have such a monopoly, the Commission misinterprets the "public convenience and necessity" criterion if it bars from the field a motor carrier proposing to furnish significantly superior service. Such action by the Commission, in our view, contravenes the command of the National Transportation Policy: That the Commission shall administer all provisions of the Interstate Commerce Act to the end that the "inherent advantages" of each of the three modes of regulated transportation be recognized and preserved and that "adequate, economical, and efficient" transportation service be promoted.

The National Industrial Traffic League contends—

> that the public is entitled under the law to adequate service by motor vehicle as well as by rail; and the availability of one mode of service has no bearing upon the public need for the other.

The pertinent portions of the National Transportation Policy provide that—

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of

> transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

From the beginning of motor carrier regulation the Commission has in many cases authorized motor carrier service notwithstanding the adequacy of the existing rail service. At the same time, the Commission does not have a rigid policy of granting or denying applications for motor carrier authority in terms of the availability of rail service. Probably the most complete statement of the Commission's views is found in its report on reconsideration in *A. J. Metler Extension—Crude Sulphur,* 62 M. C. C. 143, 147–148 (1953), as follows:

> Under the national transportation policy of "fair and impartial regulation of all modes of transportation" we are required "to recognize and preserve the inherent advantages of each and foster sound economic conditions in transportation and among the several carriers." We do not conceive that every shipper is entitled to have made available to it every mode of trans-

portation or even competing modes of transportation without regard to the volume of the available traffic or the adequacy of whatever transportation may be available. A motor carrier, for example, is not entitled, as a matter of right, to authority to serve a particular point or a particular shipper, merely because there is no other motor service and rail service only is available. Usually it is desirable from the viewpoint of the shipper and in the public interest that competition within reason be encouraged and that there be available to shippers competing modes of transportation, even competing carriers in the same field, but if sound economic conditions in transportation are to be fostered, the advantages of competition must in some instances yield to the needs of the existing carrier or carriers, depending upon the amount of the available traffic and the comparative adequacy of the existing services. Given a limited amount of traffic and an existing carrier of whatever mode which needs it more or less urgently, the question whether a competing service shall be authorized turns upon the question as to the relative or comparative adequacy of the existing service. Conceivably an existing service could be so inadequate to meet a shipper's or community's need as to justify authorization of an additional service of a new type regardless of the need of the existing carrier. The overall public need is the ultimate consideration behind the need of the carrier and if it cannot be met consistently with the carrier's need then the latter must yield.

By a letter dated January 6, 1956, to the Chairman of the Senate Select Committee on Small Business,

the Commission referred to the above-quoted portion of its report in the *Metler* case as a correct statement of its views. See Appendix B, *infra*, pp. 44–48.

Nothing in the Commission's report in the instant case indicates a departure from its policy as stated in the *Metler* case. Its decision here (as to the points not already served by motor carrier) is not based solely upon the adequacy of the existing rail service, but upon that factor plus its finding that the shippers who supported Schaffer's application did so primarily "to obtain lower rates rather than improved service."

Nothing in the National Transportation Policy or its history or in the decisions of this Court even suggests that in determining whether public convenience and necessity requires additional motor carrier service the Commission must ignore completely the impact of its action upon existing transportation facilities of whatever mode. On its face, that Policy commands that the Act be administered "to foster sound economic conditions in transportation * * * all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail * * *." The quoted portions of the National Transportation Policy can only mean that the Commission is not to ignore the effect of additional transportation facilities upon existing facilities of all kinds. This is made even clearer in the discussion of the Policy in the report of the Senate Committee on Interstate Commerce as follows:

> * * * As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads,

the railroads had a monopoly on transportation. In later years competing forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. The railroads at first refused to treat these competing forms of transportation, particularly by motor, seriously, and it was not until after much of their traffic and many of their passengers had been lured away that the railroads took drastic steps to recover the lost business. The sum and substance of the matter is that at the present time there is a plethora of transportation facilities, and under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein. S. 2009 seeks to do this. * * * *Sen. Rep. No. 433, 76th Cong., 1st Sess.*, 2–3 (1939).]

Similarly Professor Oppenheim in his treatise on the National Transportation Policy states that:

> * * * Senator Wheeler, in particular, was emphatic in his view that the declaration of policy could be relied upon as assurance that the Commission would be on notice that Congress had conferred upon it the authority and the plain duty of adjusting and coordinating inter-carrier competitive relationships with a view to the national transportation system as a whole. [*Oppenheim, The National Transportation Policy and Inter-Carrier Competitive Rates* (1945), pp. 9–10.]

The appellants' contention that the Commission was precluded by the National Transportation Policy from even considering the adequacy of existing railroad service, appears to be based largely upon the view that the only pertinent command of the Policy is to "preserve the inherent advantages of each" mode of transportation. This Court, however, has already held that the Commission must take into account all of the objectives of the Policy. Thus, as it was stated in *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 66,

> * * * That declaration requires administration so as to preserve the inherent advantages of each method of transportation and to promote "safe, adequate, economical, and efficient service." Such broad generalizations, while well expressing the Congressional purpose, must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress. [Citing cases.]

Finally, in *Alton Railroad Co.* v. *United States*, 315 U. S. 15, this Court held that railroads were parties in interest and had standing to sue to set aside an order of the Commission granting a certificate of public convenience and necessity to a motor carrier. In so holding, the Court stated (315 U. S., at 19–20) that:

> * * * We do not stop to inquire what effect, if any, the status of appellant railroad companies as intervenors before the Commission

had on their right to bring and maintain this suit. Cf. *Chicago Junction Case*, 264 U. S. 258, with *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479. They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. *They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 13–27.*

They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. Hence they are parties in interest within the meaning of § 205 (h) under the tests announced in *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266; *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47; and *Claiborne-Annapolis Ferry Co.* v. *United States, supra.* [Emphasis supplied.]

We submit that the rationale of this decision, without more, demonstrates that it was proper for the Commission to take into account, with other factors, the adequacy of the existing railroad service.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1957

APPENDIX A

Statutes Involved

National Transportation Policy, 49 U. S. C., preceding §§ 1, 301, 901, and 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 207, 49 U. S. C., § 307.

> (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able prop-

erly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

APPENDIX B

Pertinent part of letter from the Chairman of the Interstate Commerce Commission dated January 6, 1956, to Senator John Sparkman, Chairman, Senate Select Committee on Small Business. *Hearings before the Select Committee on Small Business on the Administration of the Motor Carrier Act by the Interstate Commerce Commission as it Affects Small Truckers and Shippers*, 84th Cong., 1st Sess., pp. 502–503, App. 27 (1955):

> 4. Mr. Barnes stated that the Department of Justice has "refused to support the Commission's new doctrine that rail service to a given area is sufficient ground for denial of truck service." His statement continued that "for the first 15 years of its administration, the Commission repeatedly held that the existence of adequate rail service was insufficient ground for denial of motor carrier service to serve the same area," but that recently "the Commission has shown signs of departing from this policy." In support of his statement, Mr. Barnes cites several cases in which the Commission denied motor carrier authority where it was shown, among other factors, that adequate rail service existed. Mr. Barnes further stated that "In at least two instances recently the Department of Justice, after consultation with Commission counsel, has succeeded in prevailing upon the Commission to retract its orders denying a motor carrier authority on the grounds of existing adequate rail service."
>
> To the contrary, the Commission has never had a rigid policy with respect to granting or denying applications for motor carrier au-

thority where rail service is available. Indeed, during the same period referred to by Mr. Barnes, the Commission granted many applications for motor carrier service in situations where rail service was available.[3] More important, the Interstate Commerce Act contains no inflexible requirements that a motor carrier application shall be granted regardless of the adequacy of existing rail service, or that shippers are entitled in all circumstances to a choice between rail and motor service. The nearest approach to such a legislative policy is the statement in the national transportation policy that there shall be fair and impartial regulation of all modes of transportation, "so administered as to recognize and preserve the inherent advantages of each." Another purpose of the national transportation policy is to "foster sound economic conditions in transportation and among the several carriers." In the light of these congressional objectives, the Commission is required to determine upon the record in each case whether a proposed motor carrier service is required by the present or future public convenience and necessity. In determining the need for new or additional motor carrier service, the Commission must consider not only the available transportation service but also the nature and volume of commodities to be moved, the peculiar needs of shippers, the quality of the existing service, and similar factors.

---

[3] *Erskine and Sons, Inc., Extension—Bulk Commodities*, 64 M. C. C. 87; *Dracup Extension—East Walpole, Mass.*, 64 M. C. C. 147; *Maughan Transport, Inc., Extension—Three States*, 63 M. C. C. 611; *Contract Freighters, Inc., Extension—Glass Products*, Docket No. MC–16007 (Sub-No. 12); *Thomas B. Puryear Extension—Delaware*, Docket No. MC–60041.

In contrast, Mr. Barnes' statement embodies the view that in all cases and regardless of the consequences there should be competition between motor carriers and railroad. This is clearly shown by the following statement from his presentation to the committee:

> In sum, then, this Department's unswerving position is that shippers are entitled to a choice between rail and motor carrier service. This free choice may be the essence of competition in the distribution process.

The Commission rejects such a concept of public convenience and necessity. It believes that to adopt and follow the rigid rule urged by the Department of Justice would often preclude the application of the statutory standards to the facts of particular cases. The Commission's rejection of Mr. Barnes' view, coupled with a full statement of the Commission's position, is found in the Commission's report on reconsideration in *A. J. Metler Extension—Crude Sulphur*, 62 M. C. C. 143 (1953), which is one of the cases in which, according to Mr. Barnes, "the Department of Justice * * * has succeeded in prevailing upon the Commission to retract its orders * * *." The pertinent portion of the Commission's report is as follows:

> Under the National Transportation Policy of "fair and impartial regulation of all modes of transportation" we are required "to recognize and preserve the inherent advantages of each and foster sound economic conditions in transportation and among the several carriers." We do not conceive that every shipper is entitled to have made available to it every mode of transportation or even competing modes of transportation without regard to the volume of the available traffic or the adequacy of whatever transportation may be available. A motor carrier,

for example, is not entitled, as a matter of right, to authority to serve a particular point or a particular shipper, merely because there is no other motor service and rail service only is available. Usually, it is desirable from the viewpoint of the shipper and in the public interest that competition within reason be encouraged and that there be available to shippers competing modes of transportation, even competing carriers in the same field but if sound economic conditions in transportation are to be fostered, the advantages of competition must in some instances yield to the needs of the existing carrier or carriers, depending upon the amount of the available traffic and the comparative adequacy of the existing services. Given a limited amount of traffic and an existing carrier of whatever mode which needs it more or less urgently, the question whether a competing service shall be authorized turns upon the question as to the relative or comparative adequacy of the existing service. Conceivably, an existing service could be so inadequate to meet a shipper's or community's need as to justify authorization of an additional service of a new type regardless of the need of the existing carrier. The overall public need is the ultimate consideration behind the need of the carrier and if it cannot be met consistently with the carrier's need then the latter must yield.

Denial of the instant application in the prior reports in this proceeding was predicated on the adaptability of bulk sulphur to movement by rail and grew out of an appreciation of the railroad's need for all available traffic and a lack of appreciation of the impracticality and difficulties involved in this instance in using rail service. Reexamination of the evidence now convinces us that

> it is, in fact, impracticable for the shipper to use rail service, that in the circumstances here present the rail service is insufficient and inadequate reasonably to meet the shipper's need, and that the railroad's need for revenue must yield to the shipper's (the public) need for motor service. * * *.

In brief, the Commission recognizes the desirability of competition between rail and motor carriers except where other factors indicate that competition will not serve the ultimate public convenience and necessity.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 20

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF OF APPELLEE RAILROAD COMPANIES

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IN THE

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF OF APPELLEE RAILROAD COMPANIES

QUESTION PRESENTED

In determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service, may the Commission take into consideration the existing railroad service in the area?

Appellants say: No.

Appellees say: Yes.

This is exclusively a question of law, the construction of § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307

(a), and of the National Transportation Policy, 49 U.S.C. preceding § 1.

No other question is before the Court. Appellants, p. 2, have not questioned the findings or the sufficiency of the evidence.

In the District Court the United States supported the Commission's order by answer (R. 42-44), brief, and oral argument. Hence the United States is not entitled to a review. Administrative Procedure Act § 10(a), 5 U.S.C. §1009(a)[1]; *Lee* v. *Civil Aeronautics Board*, C. A. D. C. Cir., 225 F. 2d 950, 951 (1955); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955); *Pan-Atlantic Steamship Corp.*, v. *Atlantic Coast Line Railroad Co.*, 353 U.S. 436 (1957).

Moreover, the United States has not "presented" any question for review. Administrative Procedure Act § 10(e), 5 U.S.C. § 1009(e)[2]; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, *supra* p. 500; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488 (1951).

We will take up these points more fully in our discussion of the United States brief in part 4 of our argument, p. 40.

[1] 10(a). Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

[2] 10(e). So far as necessary to decision and *where presented* the reviewing court shall decide * * *. (Emphasis added.)

STATEMENT OF THE CASE

We agree with appellants' statement, pp. 2-4.

Appellant Schaffer applied to the Commission for authority, in part, as a motor common carrier of granite from Vermont to sixteen midwestern states. No existing motor carrier performs this service. The railroads are now carrying all of the traffic. The Commission determined, after hearing, that the proposed motor carrier service is not required by the public convenience and necessity. 63 M.C.C. 247 (R. 24). Appellant American Trucking Associations, Inc., intervened in the proceedings before the Commission. Appellants sued in the District Court of South Dakota to annul the Commission's order, but that Court, after hearing, dismissed the complaint. 139 F. Supp. 444 (R. 359).

Appellee railroads opposed the application before the Commission (R. 25), were permitted to intervene in the District Court action pursuant to 28 U.S.C. § 2323 (R. 44), and filed an answer (R. 47) to appellants' complaint asking that it be dismissed.

The National Industrial Traffic League has filed a brief *amicus curiae* asking the Court to reverse the District Court.

SUMMARY OF ARGUMENT

1.

This case involves the construction of § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a), and of the National Transportation Policy of 1940, 49 U.S.C. preceding § 1. These statutes compel the Interstate Commerce Commission to take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service.

Ever since the enactment of the National Transportation Policy of 1940 the Commission has consistently construed these statutes in harmony with the statement in the preceding paragraph. The Transportation Act of 1940 repealed the declaration of policy in the Motor Carrier Act of 1935, and substituted for it the National Transportation Policy of 1940. The 1940 Policy was a substantial change from the 1935 policy. An argument can be made that prior to 1941 and under the 1935 policy the Commission's rule of decision was not in harmony, in respect to 49 U.S.C. § 307(a), with the statement in the first paragraph of this summary. But it is entirely clear that since the enactment of the 1940 Policy the Commission's rule of decision has been in harmony with such statement.

2.

The Supreme Court's decisions support the Commission's construction of these statutes. The Court holds that 49 U.S.C. § 307(a) affords protection of the economic interests of railroads in their competitive relations with motor carriers. The Court's decisions make it clear that this principle does not disappear where an applicant for motor carrier authority is proposing service to an area without

motor carrier service. Appellants are asking the Court to write into § 307(a) and the 1940 Policy a fixed limitation on the Commission's powers, to the effect that the Commission cannot take into consideration the existing railroad service in determining whether public convenience and necessity requires motor carrier service in an area without motor carrier service. It is plain that appellants' contention has no merit.

3.

Congress has shown by a course of legislation that the Commission's construction of the statutes is correct. When Congress wishes to vest complete discretion in an administrative body, without restrictions of the type contended for by appellants, it uses the language of 49 U.S.C. § 307(a). But when Congress wishes to limit the powers of the administrative agency, in the fashion for which appellants contend here, it places express limiting terms in the statutes.

This course is displayed in the legislative history of the Natural Gas Act. The original Act in 1938 gave jurisdiction to the Federal Power Commission to require proof of public convenience and necessity for building a pipeline only where the line would be competitive with an existing pipeline. The Federal Power Commission held that this excluded consideration by it of the interests of coal and railroad industries affected by a proposal subject to the Commission's jurisdiction. In 1942 Congress amended the Gas Act (1) for the express purpose of requiring proof of public convenience and necessity for the building of every pipeline, irrespective of whether there was another pipeline in the area, and (2) for the express purpose of requiring the Federal Power Commission to consider the economic interests of affected coal and railroad interests in every

such case. Congress accomplished this result, which it specifically intended, simply by writing the essential provisions of 49 U.S.C. § 307(a) into the Natural Gas Act.

The legislative histories of the freight forwarder act of 1942, and of the amendment to this act in 1957, show Congress at work writing variants of the ordinary public convenience and necessity clauses. The purposes of these variants were to impose restrictions on the power of the Interstate Commerce Commission in granting forwarder permits and to modify or remove such restrictions. This legislative history shows clearly that when Congress wants to limit an agency's granting or denial powers, in the fashion contended for by appellants, it does so expressly. This history shows clearly that Congress knows the meaning of the phrase "public convenience and necessity," knows how to impose restrictions on its exercise, and intends its administration by the agency be free from restrictions, such as appellants urge here, unless Congress imposes them.

4.

The United States supported the Commission's order in the District Court. Hence, by the terms of the Administrative Procedure Act § 10(a), the United States is not entitled to a review of the order.

Moreover, under § 10(e) of that Act the United States has not "presented" any question which can be reviewed. The United States repudiates the only "question presented" by the appellants and thus does not support appellants. The United States alleges that the "question presented" is that the Commission erred in denying Schaffer's application to furnish a motor carrier service that is superior to the railroad service. But neither the United States nor anyone else has even attempted to establish that the "whole record" before the Commission shows that Schaffer's proposed motor carrier service would be superior to the existing railroad service.

ARGUMENT

The statutes here involved compel the Commission to take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service.

The standards to be applied by the Commission in determining whether to grant appellant Schaffer's application are stated in § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a), hereafter § 307(a), and in the National Transportation Policy:

> 49 U.S.C. § 307(a). Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * * (Act of Aug. 9, 1935, 49 Stat. 551.)
>
> 49 U.S.C. preceding § 1. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competi-

> tive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Act of Sept. 18, 1940, 54 Stat. 899.)

The foundation requirement is a finding by the Commission that the proposed service "is or will be required by the present or future public convenience and necessity."

Appellants assert, p. 15, that the phrase "public convenience and necessity" in § 307(a) has tied to it the fixed implied condition that where there is no motor carrier service in an area, the Commission may not take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service. There are no statutory words anywhere that even suggest such a condition, but appellants are asking this Court to add it to the statute by construction. Appellants are plainly in error.

Our argument will proceed under the following general subdivisions: (1) The Commission has consistently held since 1940 that it may take into consideration the existing railroad service in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service. (2) The Supreme Court's decisions clearly support the Commission. (3) Congress has by legislation made it clear that the Commission's construction of the statutes here involved is correct. (4) Answer to the brief of the United States.

1.

THE COMMISSION'S CONSTRUCTION OF THE STATUTES

Ever since the enactment of the National Transportation Policy in 1940 the Commission has held that in determining whether public convenience and necessity requires motor carrier service in an area without motor carrier service it may take into consideration the railroad service in the area.

Appellants argue, pp. 7-14, that from 1935 to 1950 the Commission "has consistently recognized that the existence of adequate railroad service affords no basis for the denial of motor carrier operating authority." That contention is erroneous. While an argument may be made that this was the Commission's position from 1935 to 1941, it is clear that for the past fifteen years the Commission has held consistently that in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service it may take into account the existing railroad service. It holds that this course is required by the National Transportation Policy.

Thus in 1942 in *Bailey Common Carrier Application*, 33 M.C.C. 537, the Commission denied the application on the ground that existing railroad service was adequate, although there was no for-hire motor carrier service available to the shippers. Noting, p. 540, that the railroads urged that this disposition was required by the National Transportation Policy, the Commission said, pp. 541-542:

> "The record establishes that the shippers whom applicant proposes to serve either have bulk plants located on rail sidings or are providing their own transportation service to their bulk plants which are not located on rail sidings. While it appears that applicant might render the shippers a more convenient service than that presently available, there is no showing that

present rail service is so inadequate as to require a new operation to be instituted, or that those shippers now providing their own transportation service are unable to continue their operations. Although it appears that shipments transported by rail do not move as expeditiously as would those transported by applicant, there is no showing of any material damage resulting to any shipper by virtue of any failure by any rail carrier to provide more rapid service.

"In view of our conclusions herein, no discussion need be made respecting applicant's fitness, willingness, or ability to perform the operations under consideration.

"We find that applicant has failed to establish that public convenience and necessity require operation by applicant as a common carrier by motor vehicle, of petroleum products, in bulk, in tank trucks * * *."

Appellants say, pp. 14-15, ignoring the *Bailey* case, that *Kenosha Auto Transport Corp., Extension*, 52 M.C.C. 123, *decided in 1950*, is the *first* decision constituting "a complete about-face from its earlier decisions holding that the existence of adequate rail service furnishes no basis for denial of motor-carrier authority." But the *Kenosha* case shows on its face that appellants' statement is not correct. For in the *Kenosha* case the Commission said, 52 M.C.C. p. 127:

"We have in the past denied an application for authority to operate as a motor common carrier where only rail service was available for the movement of traffic, (see *Bailey, Common Carrier Application*, 33 M.C.C. 537) and deem the facts herein justify the same conclusion."

Pointing to the National Transportation Policy the Commission said, p. 126:

"* * * The national transportation policy, as set forth in the Interstate Commerce Act, charges us with the duty, among others, to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several car-

riers. This mandate negatives applicant's contention that it is entitled as a matter of law to a grant of the authority requested. The circumstances surrounding each proceeding are the criteria to which we must look. And examination of the facts of the instant proceeding discloses that there is a very substantial movement of these farm tractors by rail. Though shipper complains of some delays by rail service, we note no specific instances of any losses of sales occasioned by such delays, or any other serious consequences. In any transportation service reaching the proportion of the movement here involved, there are bound to be some unsatisfactory experiences regardless of the form of transportation service utilized. * * *"

In 1942 in *Worm Extension—Ainsworth and Johnstown, Nebr.*, 32 M.C.C. 641, the Commission denied a motor contract carrier application although no motor carrier service was available in part of the involved area, saying in part, p. 644:

"* * * Before we may grant the application herein, we must find that the proposed contract-carrier operation will be consistent with the public interest and the national transportation policy. The term 'consistent with the public interest' means not against or contradictory to the public interest, and it must be considered in connection with the national transportation policy of Congress, which places emphasis upon the maintenance of safe, adequate, economical, and efficient service, sound economic conditions in transportation, and the preservation of a national transportation system adequate to meet the needs of commerce."

Most of the cases cited by appellants on this point, pp. 8-10, were decided before 1941 (before the publication of 28 M.C.C.). Each of the cited cases decided since 1940 contains a qualification similar to that commented upon by appellants on page 14 of their brief, footnote 13. For example, in *Newton Extension*, 43 M.C.C. 787, 792 (1944),

the Commission said: "The evidence fairly established that the service offered by rail and motor carriers do not meet all of the demands of the shippers." And in *England Transp. Co. Extension*, 49 M.C.C. 567, 570 (1949), there was a specific finding that railroad service was inadequate. An examination of each of appellants' post-1940 cases discloses that the statement to the effect that every shipper is entitled to motor carrier service follows a specific finding as to real need for the service, or as to the inadequacy of railroad service, that makes the statement pure *dictum*.

In *Hayes Freight Lines, Inc., Extension*, 52 M.C.C. 303, 305 (1950), proposed motor carrier service was denied because there was "no proof that the present rail service * * * is in any manner inadequate." There have been other Commission decisions in accord with the instant case which are not published in full in the Commission's reports but which are filed and circulated in mimeograph copies commonly known as mimeograph reports.[3]

It is our view that the Commission's pre-1941 holding was not warranted, and it seems possible that this is now the Commission's view. Thus in *Hitchcock Common Carrier Application*, 54 M.C.C. 16, 19, (1952), the Commission said in denying an application to serve an area where only railroad service was available:

> "It is true that in numerous instances we have found the public entitled to a proposed motor service, despite the existence of rail service; but in all those instances,

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[3] For example, *Florida Tank Lines, Inc., Contract Carrier Application*, 64 M.C.C. 822 (1955); *Frozen Food Exp. Extension—Amarillo, Tex.*, 61 M.C.C. 812 (1953); *Pannell and Church Common Carrier Application*, 62 M.C.C. 837 (1954); *Consolidated Freightways, Inc., Extension—Tulalip*, 64 M.C.C. 816 (1955); *Bryson & Prevost Extension—Hagerstown, Ind.*, 53 M.C.C. 822 (1951); *Heller & Heller Extension—East Stroudsburg, Pa.*, 54 M.C.C. 817 (1952); *St. Mary's Truck Line, Inc., Extension—Granite City, Ill.*, 52 M.C.C. 822 (1951).

> we found that public convenience and necessity required the proposed service, basing such finding on all the facts of record, including the existence of rail service and the absence of motor service. We were not, as applicant seems to suggest, finding that, as a matter of law, an applicant should be authorized to perform a proposed service merely because no existing motor service has been shown. Each proceeding, resting upon its own merits, must include a consideration not only of these facts but also of all other pertinent facts, such as the quantity and quality of service actually available, the adequacy of that service for the reasonable and well-founded transportation requirements of the interested shippers and receivers, the possibility of obtaining service improvements, if needed, from existing carriers by reasonable efforts, and the possible effect of the proposed service upon existing carriers."

The motivation for the decisions in the pre-1941 cases was the Commission's construction of the original declaration of policy in the Motor Carrier Act of 1935, 49 Stat. 543 § 202(a). See the excerpt from *Bowles Common Carrier Application*, 1 M.C.C. 589, 591 (1937), citing § 202(a), which is quoted in appellants' brief, pp. 7-8. Appellants recognize this, for they also quote, pp. 10-11, part of the original declaration of policy, § 202(a), and say in respect to it, p. 11: "It was the quoted language [of § 202(a)] which furnished the basis for the statement in the *Bowles* case, *supra*, * * * and the ultimate conclusion that shippers and consignees are entitled to adequate service by motor vehicle as well as by rail."

This original declaration of policy in the Motor Carrier Act of 1935, § 202(a), was repealed by the Transportation Act of (Sept. 18) 1940. 54 Stat. 919-920 §§ 16, 17(a). The 1940 Act created the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1, and specifically provided for the substitution of the Policy for the repealed § 202(a). 54 Stat. 919-920 §§ 16, 17(a). (The 1940 Act also

designated the Motor Carrier Act of 1935 as Part II of the Interstate Commerce Act. 54 Stat. 919 § 15.)

Thereafter the Commission, taking note of the 1940 Policy declaration, changed its rule of decision that had been based on former § 202(a) and conformed its holdings to the new National Transportation Policy. See *Bailey Common Carrier Application*, 33 M.C.C. 537 (1942), *Worm Extension*, 32 M.C.C. 641 (1942), and other cases cited above.

Appellants are in error when they assert, p. 11, that the National Transportation Policy of 1940 is but a continuation of the original declaration of policy in § 202(a) of the 1935 Act. The 1940 Act announced a new Policy.

The declaration of policy in the "Motor Carrier Act, 1935" was the following, 49 Stat. 543:

> "Sec. 202(a). It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

Comparison of the above 1935 policy declaration with the 1940 Policy which was substituted for it, p. 7 above, 54 Stat. 919-920 §§ 16, 17(a), makes their differences apparent. The repealed § 202(a) was plainly slanted to foster motor

carrier transportation. Reference to "other carriers" occurs only once and is only incidental to the main purposes of the section. In contrast, the 1940 Policy provides equality of regulation without any slant toward any form of transportation.

The Senate Committee on Interstate and Foreign Commerce, reporting the Transportation Act of 1940 for passage, S. 2009, said in part in discussing the proposed National Transportation Policy, Senate Report No. 433, pp. 2-3, 76th Cong., 1st Sess. (Serial vol. 10293):

> "As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads, the railroads had a monopoly on transportation. In later years competing forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. The railroads at first refused to treat these competing forms of transportation, particularly by motor, seriously, and it was not until after much of their traffic and many of their passengers had been lured away that the railroads took drastic steps to recover the lost business. The sum and substance of the matter is that at the present time there is a plethora of transportation facilities, and under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein. S. 2009 seeks to do this."

The Court noted the National Transportation Policy as a new development in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 66 (1945), saying:

> "The National Transportation Policy has recently been authoritatively summarized by Congress. That declaration requires administration so as to preserve the inherent advantages of each method of transportation, and to promote 'safe, adequate, economical and

> efficient service.' Such broad generalizations, while well expressing the Congressional purpose, must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interest in the different types of carriers with due regard to the declared purposes of Congress."

That statement is highly significant because of the practical application made of it in the *Parker* case, in construing the relationship of the 1940 Policy and 49 U.S.C. § 307(a). We deal with the point fully in the following section of our brief.

2.

THE SUPREME COURT'S CONSTRUCTION OF THE STATUTES

The Supreme Court's construction of the statutes sustains the Commission's construction.

The Court has construed 49 U.S.C. § 307(a) and the National Transportation Policy in several cases. The Court's uniform construction clearly sustains the Commission's construction.

Alton Railroad Co. v. *United States,* 315 U.S. 15, 18-20 (1942), held that a railroad is a "party in interest" who may sue to set aside an order granting "grandfather" motor carrier authority under 49 U.S.C. § 306(a). *Chicago, St. P. M. & O. Ry. Co.* v. *United States,* D.C. Minn., 50 F. Supp. 249 (1943), affirmed in *Chicago St. P. M. & O. Ry* v. *United States,* 322 U.S. 1 (1944), held that the railroads' "party in interest" status was equal and indistinguishable in 49 U.S.C. §§ 306(a) and 307(a).

In the *Alton* case the railroads were held to satisfy the "party in interest" test because one purpose of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301 *et seq.*, was to protect their economic interests in competition with motor carriers. That should be kept clearly in mind. It is made entirely clear by the Court, 315 U.S. pp. 19-20:

> "They [the railroads] clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of [applicant] Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry —competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong. 2d Sess. pp. 13-27. They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong. 1st Sess.; H.

> Rep. No. 1645, 74th Cong. 1st Sess. Hence they are parties in interest within the meaning of § 205(h) under the tests announced in *Texas & P.R.Co.* v. *Gulf, C. & S. F. R. Co.*, 270 US 266; *Western P. California R. Co.* v. *Southern P. Co.*, 284 US 47; and *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 US 382, *supra*."

The cases cited in the foregoing excerpt have a highly significant import. All had to do solely with protection of competitive economic interests through regulation under the Interstate Commerce Act. The first two involved competitive economic interests of railroad against railroad. The third was between a railroad ferry subject to the Interstate Commerce Act and a water carrier not subject to the Act but whose competitive economic interests, nevertheless, were held subject to protection under the Act because its operations were competitive with operations subject to the Act. Thus in the *Alton* case the Court very properly construed the Motor Carrier Act, now Part II, as affording between railroads and motor carriers the same type of protection of competitive economic interests that was provided under Part I of the Act.

It is plain that that economic interest and the protection afforded it by Part II of the Act extend all the way through a proceeding under § 307(a), from the hearing before the Examiner to the review in the Supreme Court. "The legislation aimed at a whole embraces all its parts." *United States* v. *Darby*, 312 U.S. 100, 123 (1941).

The economic interest so protected is a very broad one. The idea that that broad economic interest becomes nonexistent because there is no present motor carrier service in the area covered by an application for new motor carrier authority is not compatible with the sweeping ground of decision of the *Alton* case nor with the authorities it cites. It is impossible to attribute to the *Alton* decision the hidden qualification that its principle does not apply where rail-

roads are opposing the application for the first motor carrier service in an area.

Appellants contend for a construction of § 307(a) and of the National Transportation Policy that would require writing into those acts a fixed condition binding upon the Commission in all cases. The Court has refused to engraft on these statutes specific and binding limitations of this type.

Thus *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), involved a Commission order under § 307(a) authorizing service by a railroad controlled motor carrier. Independent motor carriers serving the area asked the Court to hold that the National Transportation Policy and § 307(a) contained implied limitations that precluded such grant of authority where existing independent motor carriers were ready, willing, and able to render the proposed service. The Court held that the Commission's broad powers could not be so limited, saying, 326 U.S. pp. 65, 73:

> "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. * * * This, of course, gives administrative discretion to the Commission * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances."
>
> * * * * *
>
> "The alternative to the existence of this discretion is that the language of the Interstate Commerce Act, part II, forbids the granting to railroads of a certificate of convenience and necessity for the operation of motor trucks, under specially limited certificates, when there are certificated motor carriers, independent of railroad authority or supervision, with whom arrangements for the service might be made by the rail carriers. *There is no such prohibition in terms. Any such implication is negated by the discretion to grant certificates*

conferred on the Commission by the Act." (Emphasis added)

Similarly, in the instant case the implication which appellants are asking the Court to write into § 307(a) and the Policy "is negated by the discretion to" *deny* "certificates conferred on the Commission by the Act," in determining public convenience and necessity. The phrase in § 307(a) "otherwise such application shall be denied," confers discretion to deny equal to the discretion to grant.

In *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953) a cognate question was presented, whether the Commission's statutory powers were broad enough to authorize the making of trip-leasing regulations. Holding that the power existed despite the absence of express terms authorizing it, the Court said, p. 310:

> "* * * Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States* v. *Pennsylvania R. Co.* 323 US 612. * * *"

In *United States* v. *Pennsylvania Railroad Co.*, 323 US 612 (1945), cited in the above excerpt, the Court held that lack of specific statutory authority did not render invalid a Commission order requiring railroads to deliver their cars to a water carrier in through transportation. These two cases illustrate the principle that the broad powers which Congress has vested in the Commission are not to be whittled away by imposing judicial restrictions upon them.

Maintenance of Competition

Appellants, pp. 16-20, present an argument under the heading, "Maintenance of Competition." The legal aspects

of much this argument are answered by *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). Citing the Interstate Commerce Act and decisions construing it the Court said, p. 95:

> "To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress. And since we read the opinion of the Commission as saying precisely that, we think the case must be remanded for its reconsideration. * * *"

As a part of their argument on competition appellants say, p. 20, citing a few statistics: "* * * one is constrained to wonder why the Commission felt these railroad giants needed to be protected from the competition of a relatively insignificant operator such as Schaffer." Two answers, legal and statistical, are the following.

Regulation under the Interstate Commerce Act comprises, among other things, the regulation of *all* motor carriers and *all* railroads considered as a mass; it is concerned with the total impact of all motor carriers upon all railroads. Such regulation cannot ignore or minimize any carrier, no matter how small, since his relation to the whole mass makes him important. Two characteristic statements of this principle are the following:

United States v. *Darby*, 312 U.S. 100, 123 (1941):

> "Congress * * * recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. * * * The legislation aimed at a whole embraces all its parts."

Wickard v. *Filburn*, 317 U.S. 111, 127-128 (1942):

> "That appellee's own contribution to the demand

for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

The Commission may have had in mind, in addition to the figures cited by appellants, p. 20, that the motor carrier industry is huge and growing and that certain unbalanced developments in respect to comparative revenues and ton-miles of railroads and motor carriers may be cause for concern.[4] For example, in 1955 motor carrier revenues

[4] TRENDS IN REVENUES AND TON-MILES

RAILROADS AND MOTOR CARRIERS REPORTING TO I.C.C.

	OPERATING REVENUES			TON-MILES		
	1	2	3	4	5	6
Year	Railroads (000,000)	Motor Carriers (000,000)	Ratio of Col. 2 to Col. 1 (per cent)	Railroads (000,000)	Motor Carriers (000,000)	Ratio of Col. 5 to Col. 4 (per cent)
1939	$3,297	$ 792	24.02	335 375	19 646	5.86
1940	3,584	867	24.19	375 369	20 683	5.51
1941	4,510	1,096	24.30	477 576	26 835	5.62
1942	6,026	1,213	20.13	640 992	28 083	4.38
1943	6,866	1,305	19.01	730 132	28 768	3.94
1944	7,087	1,352	19.08	740 586	27 252	3.68
1945	6,617	1,406	21.25	684 148	27 289	3.99
1946	5,866	1,655	28.21	594 943	30 448	5.12
1947	7,141	2,214	31.00	657 878	37 693	5.73
1948	8,090	2,698	33.35	641 104	46 706	7.29
1949	7,151	2,911	40.71	529 111	47 891	9.05
1950	7,934	3,737	47.10	591 550	65 648	11.10
1951	8,758	4,169	47.60	649 831	72 292	11.12
1952	8,915	4,418	49.56	617 942	70 843	11.46
1953	9,078	4,926	54.26	608 964	76 510	12.56
1954	7,915	4,737	59.85	552 197	69 392	12.57
1955	8,665	p 5,535	63.88	626 892	p 75 119	11.98

p = preliminary

SOURCE:

Columns 1 and 4 from "Transport Statistics in the United States, Part I, 1955", table 155, page 116, published by the Interstate Commerce Commission.

Column 2, years 1939 through 1950, from I.C.C. Statement No. 531, table 1, column c, page 4, entitled "Class I, II and III Motor Carrier Revenues—Ton Miles and Passenger Miles, 1939-51". Years 1951 through 1955 from "Transport Economics, October, 1956", page 8, published by the Interstate Commerce Commission.

Column 5, years 1939 through 1950, from I.C.C. Statement No. 531, table 3, column c, page 10, entitled "Class I, II and III Motor Carrier Revenues—Ton Miles and Passenger Miles, 1939-51". Years 1951 through 1955 from "Transport Economics, October, 1956", page 10, published by the Interstate Commerce Commission.

were 63.88 per cent of railroad revenues, while motor carrier ton-miles were but 12.98 per cent of railroad ton-miles.

No Inference from Legislation Proposed But Not Enacted

The argument is made by appellants, pp. 12-13, and by the National Industrial Traffic League, pp. 9-10, that certain bills introduced in Congress but not reported by Committees are evidence of Congressional intent. Appellants and the League are in error. Such legislative activity casts no light on the intent of Congress, *United States* v. *Turley*, 352 U.S. 407, 415, footnote 14 (1957); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950); *New York* v. *Saper*, 336 U.S. 328, 338-340 (1949); and cannot be construed as an admission by an agency proposing such legislation of the construction to be placed on a statute, *Wong Yang Sung* v. *McGrath*, *supra*.

The District Court Understood and Disposed of the Issues

In pages 23-25 appellants discuss what they call "The District Court's fundamental error." The three sentences from the Court's opinion cited at the top of page 24 are plucked out of context and plainly do not represent the Court's holding. The Court's opinion (R. 359-369), read as a whole, shows clearly that the Court decided the two issues before it: (1) whether the Commission had statutory authority to consider the existing railroad service in determining whether to grant the Schaffer application, and (2) whether the evidence sustains the Commission's findings. It answered both of these questions in the affirmative. The language quoted at the top of page 24 of appellants' brief must be read in connection with the whole opinion, since the Court was there speaking in generalities.

Appellants' Factual Arguments

Appellants argue various factual matters in pages 21-30. These have no bearing upon the single question of law that appellants present, p. 2. They pertain solely to various questions of fact to be considered by the Commission in determining public convenience and necessity. Moreover, appellants give a large record an exceedingly fragmentary and gingerly treatment. For example, the representative of the Rock of Ages Corporation testified that if Schaffer published a tariff with a higher rate level than the less carload rail rate his company would not give Schaffer its business (R. 261). The witness thus made it clear that his interest was primarily the rate level and not the service factor. There is a great deal more evidence of this character which would have to be considered in determining factual issues which appellants mention but which they do not try to support by citation of evidence. On page 25 appellants present an argument under the heading "Preservation of Inherent Advantages of Motor Carrier Service." Again that is an issue committed to the Commission and decided by it upon a large record which appellants have not attempted to brief.

3.

THE CONSTRUCTION OF THE STATUTES BY CONGRESS

Congress has by legislation made it clear that the Commission's construction of the statutes here involved is correct.

Congress has used in several statutes the language of § 307(a), "public convenience and necessity". Congress has used in other public service statutes very meaningful variants of that phrase. Congress has placed express limitations upon agency power and has removed express limita-

tions. By all of this legislative action Congress has clearly demonstrated two general principles:

(1) When Congress intends to give the administrative agency full administrative discretion, without any implied limiting conditions such as appellants urge here, it uses the phrase of § 307(a), "public convenience and necessity".

(2) But when Congress wishes to attach some special condition to the granting power of an administrative agency, such as appellants urge here, Congress does so in express terms without leaving to implications any important limitations on the agency's granting power.

Congress has in this field displayed wakeful legislative activity and discernment over the years. If the Court were to agree with appellants it would mean that the Court would be joining with Congress in legislative activities that Congress has clearly staked out as lying strictly within its own legislative competence. We will now examine the course of this legislation.

Congress has used the phrase "public convenience and necessity" as the standard for the grant of new authority in the following public services: railroads in 1920[5]; radio broadcasting in 1927[6], reenacted in same words in 1934[7]; telegraph and telephone in 1934[8]; motor carriers in 1935; air carriers in 1938[9]; and water carriers in 1940[10]. *For texts of these acts see Appendix hereto.*

The phraseology of the "public convenience and necessity" clauses of all of these statutes is substantially identical, and the Court has cited its decisions construing the

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[5] Act of Feb. 28, 1920, 41 Stat. 477, 49 U.S.C. § 1(18).
[6] Act of Feb. 23, 1927, 44 Stat. 1162, 1166 §9.
[7] Act of June 19, 1934, 48 Stat. 1083, 47 U.S.C. § 307(a).
[8] Act of June 19, 1934, 48 Stat. 1075, 47 U.S.C. § 214(a).
[9] Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. § 481(d)(1).
[10] Act of Sept. 18, 1940, 54 Stat. 941, 49 U.S.C. § 909(c).

clause in one statute as authority for the construction of the clause in another statute.[11]

THE NATURAL GAS ACT

But in 1938, in the Natural Gas Act, June 21, 1938, 52 Stat. 821, 15 U.S.C. §§ 717 *et seq.*, Congress departed from its former use of the phrase "public convenience and necessity" and provided standards for the grant of public service authority different from the standards set up in the earlier statutes. After a few years of experience this Act was amended Feb. 7, 1942, 56 Stat. 83. The original act, the amendment, and the legaslative history show clearly what Congress intends by "public convenience and necessity". It may be noted that the Natural Gas Act was passed by the same Congress that enacted the Civil Aeronautics Act of June 23, 1938. This latter act, as has been pointed out, employed the regular "public convenience and necessity" standard.

The Natural Gas Act, as originally passed in 1938, contained the following section, 52 Stat. 825:

> "7(c). No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market *in which natural gas is already being served by another natural-gas company*, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof; *Provided, however*, That a natural-gas company al-

[11] *Federal Communications Comm.* v. *R.C.A. Communications, Inc.*, 346 U.S. 86, 90, 92, 94, 96 (1953); *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65, 66, 68, 69, 72 (1945).

> ready serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. * * *" (Emphasis added).

It will be noted that this provision differed from the other statutes above cited in that a natural gas company did not need to obtain authority to serve a market that had no natural gas service. An application for authority was required only for proposed service "to a market in which natural gas is already being served by another natural gas company".

In the first application proceeding under this section the Federal Power Commission held that coal, railroad, and labor interests that would be affected by the construction of a natural gas pipeline had no standing to intervene in opposition and that the Commission could not consider such interests in determining issues of public convenience and necessity. *Matter of Kansas Pipe Line and Gas Co.*, 2 F.P.C. 29 (1939). While the Commission permitted various natural gas companies to intervene in opposition, p. 32, it denied intervention to the coal, railroad and labor interests, p. 32, and it said in part, p. 57:

> "The coal, labor, and railroad interests who have participated in these proceedings have urged that we consider the adverse effects upon their interests of the certification of these proposed pipe lines. We have already noted that section 7(c) of the Natural Gas Act does not give us unlimited jurisdiction over all proposed construction of facilities for the transportation of natural gas but that our jurisdiction attaches only when proposed construction is of facilities *for the transportation of natural gas to a market in which natural gas is already being served by another natural gas company.* In the light of that restriction on our jurisdiction and having regard to all other provisions of the Natural Gas Act, it would appear that Congress

did not intend this Commission generally to weigh the broad social and economic effects of the use of various fuels." (Emphasis is Commission's)

To change the effect of that holding was one of the principal purposes of the amendment of Feb. 7, 1942, to the Natural Gas Act, 56 Stat. 83. Taking note of the Commission's decision, Congress amended the Act for the express purposes, among others, to give to competing coal, railroad, and labor interests the status of parties in interest, and to require the Commission to consider such interests in determining public convenience and necessity. Congress accomplished that by repealing the original § 7(c), of the Natural Gas Act, 52 Stat. 825, and by substituting therefor the present subsections (c) to (g), inclusive, of 15 U.S.C. § 717 f. See 56 Stat. 83.

The proposed amendment, now 15 U.S.C. § 717 f (c) to (g), was set out in full in the report of the House Committee on Interstate and Foreign Commerce recommending the legislation, Oct. 21, 1941. House Report No. 1290, p. 4, 77th Cong., 1st Sess. (Serial vol. 10557). It was enacted exactly as proposed and became effective Feb. 7, 1942. The purpose of the amendment was stated as follows in the Report, pp. 2-3:

"The bill, if enacted, will amend section 7(c) of the Natural Gas Act, which at present requires a natural-gas company to obtain from the Federal Power Commission a certificate of public convenience and necessity only for construction or extension of facilities or extension of service 'to a market in which natural gas is already being served by another natural-gas company,' so as to require that a certificate be obtained in all cases as a condition precedent to the engaging in transportation or sale of natural gas subject to jurisdiction of the Commission, or to undertaking construction or extension of facilities. * * *"

"7(c) of the Natural Gas Act, as at present in force,

has proved unsatisfactory not only from the standpoint of administration by the Commission, but also the natural-gas companies themselves, as well as to the producers of competing fuels and the operators of competitive methods of transportation whose economic interests may be affected by the construction or extension of natural-gas pipe lines. * * * The limitation, moreover, to cases of extensions involving competition with another natural-gas company in a market already being served, has been held by the Commission to have the effect of excluding from consideration the interests of producers of competing fuels and competitive methods of transportation.

* * * * *

"The bill, as amended, eliminates the objections to the present section 7(c) above mentioned. By this legislation, the present jurisdictional disputes are eliminated, and the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation interests. * * *".

Subsection (e) of the amendment, 15 U.S.C. § 717 f (e), is the following:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certifi-

cate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The language used in the foregoing subsection (e), except the last sentence, is substantially that of 49 U.S.C. § 307(a), p. 7 above, construction of which is involved here. While there is close harmony of substance among the terms of all of the "public convenience and necessity" statutes, see Appendix, the order of the phrases in 49 U.S.C. § 307(a) differs from the order of the phrases of the other statutes; and subsection (e) of the 1942 amendment to the Natural Gas Act follows identically the phrasing of § 307(a) instead of the phrasing of the other acts. Also, subsections (c) and (d) of the Gas Act amendment follow closely and are obviously modeled upon 49 U.S.C. § 306(a)(1) and (b). The language of the 1942 amendment is undeniably that of the application and certificate provisions relating to motor common carriers.

It is to be noted that two effects of the 1942 amendment were: (1) to require an application for a certificate of public convenience and necessity to serve an area *not* having natural gas service, and (2) to require consideration of the interests of competitive fuel and transportation services in determining public convenience and necessity in such a case. These two new features, previously lacking, were brought into the Act together by the amendment. *The Committee Report stated that these results would be accomplished by incorporating in the Natural Gas Act the language of the "public convenience and necessity" provisions governing motor common carriers.* No other language than that of 49 U.S.C. § 307(a) was needed, in the opinion of Congress, to accomplish these results.

The 1942 Amendment has been given due effect by the courts. Thus it is held that in a proper case, the Federal

Power Commission would have power under the amendment to deny an application for construction of a natural gas pipeline to serve an area *not* having natural gas service upon consideration of the interests of competing coal and railroad industries. *National Coal Association* v. *Federal Power Commission*, C.A.D.C. Cir., 191 F. 2d 462, 465, 466 (1951). This Court commented briefly on the effect of the 1942 amendment in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 617 (1944), a rate case, in distinguishing between the powers possessed by the Commission in rate and certificate cases, saying, p. 617:

> "The Act of February 7, 1942, by broadening § 7 gave the Commission some additional authority to deal with the conservation aspects of the problem."

The construction of the 1942 amendment arising from the Report of the House Committee and from the enactment of the legislation proposed by the report is a Congressional construction of the meaning of 49 U.S.C. § 307(a). *Great Northern Railway Co.* v. *United States*, 315 U.S. 262, 276-277 (1942); *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 329-330 (1942). It is a construction that in a proper case under § 307(a) the Commission has power to deny an application for motor carrier authority to serve an area *not* having motor carrier service upon the ground that public convenience and necessity does not require such service, and that one of the factors of public convenience and necessity is the existing railroad service. *Great Northern Railway* and *Sioux Tribe* cases, *supra*. In each of those cases a committee report upon proposed legislation which was enacted was held to be controlling on the construction of an earlier cognate act.

An element of difference may be noted here between the application of "public convenience and necessity" in the Natural Gas Act and in the motor carrier statutes.

Under the Gas Act the Federal Power Commission must consider the economic interests of industries over which it has no jurisdiction, such as coal, railroads, water carriers,[12] and labor organizations. Assuredly the Interstate Commerce Commission, having jurisdiction over both motor and rail carriers, has even wider administrative power and discretion in respect to their competitive relationships than that possessed by the Power Commission in respect to competitive interests of parties over whom it has no jurisdiction. *Alton Railroad Co. v. United States*, 315 U.S. 15, 19-20 (1942), *supra*.

THE FREIGHT FORWARDER ACT

Further illumination of the question in this case is afforded by the act of 1942 regulating freight forwarders, its amendment in 1957, and the legislative histories of the two enactments. Act of May 16, 1942, 56 Stat. 284, 49 U.S.C. §§ 1001 *et seq.*, known as Part IV of the Interstate Commerce Act. Act of August 28, 1957, 71 Stat. 452, amending § 410(d) of the Interstate Commerce Act, 49 U.S.C. § 1010(d).

The same Committee of the House of Representatives that on Oct. 21, 1941, submitted its report on the amendment to the Natural Gas Act, p. 28 above, submitted on August 13, 1941, its report on the proposed legislation that became the Freight Forwarder Act, House Report No. 1172, 77th Cong., 1st Sess. (Serial vol. 10557). The bill under consideration, S. 210, as passed by the Senate required freight forwarders to obtain certificates of public convenience and necessity. The Senate Committee in reporting the bill, March 20, 1941, had stated that in this respect "Its provisions are substantially the same as those

[12] *City of Pittsburgh* v. *Federal Power Commission*, C.A.D.C. Cir., 237 F. 2d 741, 753-754 (1956).

applying to rail, motor, and water carriers." Senate Report No. 132, p. 6, 77th Cong., 1st Sess. (Serial vol. 10543). The House Committee struck all of S. 210, substituted language of its own, and explained the differences between the original S. 210 and the House Committee's proposed substitute, in respect to obtaining authority to operate, as follows, H. Rep. 1172, p. 22, 77th Cong., 1st Sess. (Serial vol. 10557):

> "S. 210, in section 407, requires the obtaining from the Commission of certificates of public convenience and necessity and recognizes 'grandfather rights' with respect to freight forwarders in operation on July 20, 1947. The committee substitute, in section 410, contains no provision with respect to 'grandfather rights' and instead of providing for certificates of public convenience and necessity requires freight forwarders to obtain permits which are to be issued without the requirement of a showing of public convenience and necessity. The applicant must establish, however, that it is ready, able and willing to perform the service proposed, and that the proposed service is or will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act.
>
> "The Committee substitute provides that permits may not be denied solely on the ground that the proposed service will be in competition with services performed by another freight forwarder. S. 210 contains no such provision.
>
> "The Committee substitute prohibits the issuance of a permit to a common carrier subject to part I, II, or III; but provides that no application for a permit shall be denied to a corporation affiliated with a common carrier subject to part I, II, or III, because of the relationship between such corporation and such common carrier. S. 210 is silent on the right of a carrier to obtain a certificate as a freight forwarder."

The House Committee's substitute section 410, above de-

scribed, was reported in full in House Report No. 2066, pp. 9-10, 77th Cong., 2nd Sess. (Serial vol. 10663), conference Report to accompany S. 210, May 4, 1942, and was enacted exactly as reported. 56 Stat. pp. 291-292, 49 U.S.C.A. §1010(a) to (d), 1951 ed.

Subdivisions (c) and (d) of § 1010 as originally enacted in 1942 were the following:

> "(c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing to properly perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. * * *"
>
> "(d) The Commission shall not deny authority to engage in the whole or any part of the proposed service covered by any application made under this section solely on the ground that such service will be in competition with the service subject to this chapter performed by any other freight forwarder or freight forwarders."

It seems plausible that the change from the Senate to the House version was occasioned by the views expressed in a letter from the Chairman of the Interstate Commerce Commission to the House Committee. This letter opposed requiring proof of public convenience and necessity for

forwarder operation and suggested some lesser measure of control.[13]

It will be seen that subsection (d) attached as a condition to the Commission's power in respect to forwarder permits that a permit could not be denied

> "on the ground that such service will be in competition with the service subject to this chapter performed by any other freight forwarder or forwarders."

This provision was approved by the same House Committee of the 77th Congress, 1st Session, that approved the 1942 amendment to the Natural Gas Act, p. 29 above. The two acts and the two reports show a clear understanding of what the Committee intended. The Amendment to the Gas Act markedly tightened up entry into service by requiring proof of public convenience and necessity as to areas without natural gas service. And the Gas Act amend-

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[13] Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 77th Cong., 1st Sess., on H.R. 3684, March 11-26, 1941. This was the House counterpart of original S. 210. See House Report No. 1172, p. 5, 77th Cong., 1st Sess., Aug. 13, 1941, on S. 210 (Serial vol. 10557). The letter, dated Mar. 12, 1941, stated in part in respect to the proposed requirement, Hearings p. 134:

> "We recommend that this entire section be stricken. Its administration will be a source of great difficulty and confusion to all concerned, and we do not believe that the public interest will be adversely affected if this is avoided. A forwarder may operate only over routes and may serve only points operated over and served by common carriers subject to the Act. The public convenience and necessity as to such routes and as to service at such points has been, and as to new services must be, determined with reference to the carriers actually performing the transportation. As to a forwarder which merely utilizes existing facilities that would be available to the shipper in any event, no determination of public convenience and necessity is necessary.
>
> "* * * Some of the Commissioners believe that while the issuance of certificates of public convenience and necessity to forwarders should not be authorized, some measure of control over the right to engage in such business insofar as interstate commerce is concerned should be exercised."

ment, by the adoption of the provisions of 49 U.S.C. § 307(a) regulating motor carriers, further required the Federal Power Commission to consider the interests of and service being rendered by competitive industries. On the other hand the forwarder act omitted the "public convenience and necessity" requirement first proposed, and forbade denial of a permit solely because one or more other forwarders were in service in the area.

These clearly expressed legislative actions demonstrate a complete awareness by Congress of methods of granting and conditioning administrative power and discretion, and of the intention to use such methods. They disclose express intention by Congress to vest certain powers in administrative agencies and express intention to limit agency powers when deemed necessary. Appellants are asking the Court to intrude into this legislative field by imposing on § 307(a) of Title 49 exactly the type of condition that Congress has dealt with in these various acts regulating interstate commerce pursuant to its powers under the Commerce Clause. Assuredly that is Congress' field and not the Court's.

Amendment of 1957 to Freight Forwarder Act

By the Act of August 28, 1957, 71 Stat. 452, subsection (d) of § 1010 of Title 49, was amended in material fashion that further evidences Congress' preoccupation with this field of legislation and thus the exclusion of judicial amendment in the field. Subsection (d) as originally enacted was in such broad terms that it gave the Commission little, if any, exclusionary power. This liberal entry provision was of course in harmony with the recommendations in the Commission's letter to the Committee described above, p. 34. However, experience proved the need for tightening the Commission's exclusionary powers. The subject is explained in the following excerpts from the Report of the Senate Committee on Interstate and Foreign Commerce, Senate Report No. 542, p. 2, 85th Cong., 1st Sess., June 27, 1957, to accompany S. 1383. The bill so recommended for

passage was enacted by Congress without change.

"Section 410 of the Interstate Commerce Act provides that no person may engage in service as a freight forwarder subject to the act without first obtaining from the Interstate Commerce Commission a permit authorizing such service. The standards that must be met, and the proof that must be made by an applicant for a freight-forwarder permit are set forth in the section.

"Subsection (d) of Section 410 contains a restriction on the Commission's powers to deny an application for a freight-forwarder permit. It provides that the Commission shall not deny authority to engage in freight-forwarder service solely on the ground that such proposed service will be in competition with the service subject to part IV of the act performed by any other freight forwarder or freight forwarders.

"In the administration of other parts of the act the consideration most frequently weighed by the Commission, in determining whether a new carrier service will be consistent with the public interest, is its probable effect upon existing carriers. The Commission repeatedly has stated that the maintenance of sound economic conditions in transportation would be jeopardized by allowing new operators to enter a field in competition with existing carriers who are furnishing adequate, efficient, and economical service. (*See Lifschultz, Extension*, 265 I.C.C. 431, 439 (1948). Being prohibited from taking this vital factor of competition into consideration in passing upon applications for freight-forwarder permits, the Commission has felt compelled to grant permits with great liberality. This has resulted in overcrowding the forwarder field and ultimately the ill effects will be felt by the general public which depends upon freight-forwarder services.

"The bill, as reported, differs from S. 1383 as introduced. S. 1383, as introduced, would not only have eliminated subsection (d) of section 410, but would have changed other standards for granting freight forwarder operating rights. It would have required the obtaining of certificates of public convenience and ne-

cessity, in lieu of permits, to engage in freight-forwarder service.

"While there is no doubt merit to the proposal as recommended by the Commission, the most glaring defect in the law that has been directed to the attention of the committee is the prohibition against considering competition in passing upon applications for forwarder permits. Accordingly, the bill as reported amends only subsection (d) of section 410 of the act.

"The amended bill does not eliminate subsection (d) of section 410, but adds language which will make that subsection pertinent only in the case of applications for freight-forwarder permits made by corporations controlled by common carriers subject to part I of the act. This will have the effect of maintaining the status quo with respect to any application to institute freight forwarder service by a railroad-controlled corporation, but will remove the limitations on the Commission's powers imposed by section 410 (d) insofar as all other applications are concerned.

* * * * *

"It has long been recognized that in order to maintain sound economic conditions in transportation, and to insure adequate, efficient, and economical service for the public, the Interstate Commerce Commission must have effective control over the number of entrants and extent of service in any given field of transport. As early as the Transportation Act of 1920, it was provided, in section 1 (18) of the Act, that no carrier by railroad shall undertake any extension of its line or construct a new line of railroad unless there shall first have been obtained from the Commission a certificate that the present and future public convenience and necessity require it. The same pattern of controls was extended to common carriers by motor and water when they were brought under regulation.

"Under the above-mentioned provisions of the act, the Commission has regularly and frequently denied applications for new or additional operating authority upon the grounds that the service of existing carriers was adequate to meet all reasonable requirements of the shipping public, and that the institution of addi-

tional service would result in needless and uneconomic duplication of existing facilities."

The bill so recommended and passed, the new § 410(d) of the Interstate Commerce Act, 49 U.S.C. § 1010(d), is the following, 71 Stat. 452, the only change in old § 1010(d) being shown in italics:

> "(d) The Commission shall not deny authority to engage in the whole or any part of the proposed service covered by any application made under this section *by a corporation controlled by, or under common control with, a common carrier subject to part I of this Act* solely on the ground that such service will be in competition with the service subject to this part performed by any other freight forwarder or freight forwarders." (Emphasis added).

The amendment changed the statute so as to permit the Commission to take into consideration existing forwarder service in determining whether there is public need for additional new forwarder service, subject, however, to one exception. In passing upon an application of a railroad controlled forwarder for new authority the Commission cannot take into account the existing forwarder service. Appellants are asking the Court to legislate in such fashion as to give a different kind of twist to 49 U.S.C. § 307(a), but a twist, nevertheless, that only Congress has power to give.

The foregoing Committee Report emphasizes again that in a field where Congress is regularly and understandingly exerting its legislative policies, the Court should not interpose any amendments by judicial construction. If the Court were to construe § 307(a) of Title 49 as appellants advocate, the Court would be entering into legislative deliberations of exactly the type portrayed in the Committee's Report. Congress, with an over-all view of transportation, and with the aid of its Committees, makes and changes laws regulating public carriers. It has demonstrated conclusively that where it has interposed no specific limita-

tions in a regulatory statute none are to be implied. It has likewise demonstrated that where specific limitations are to be placed upon a regulatory statute, such as appellants contend for, Congress will exercise that purely legislative function.

4.

ANSWER TO THE BRIEF OF THE UNITED STATES

In the District Court the United States supported the Commission's order, hence the United States is not entitled to judicial review of the order. The United States repudiates the only question presented by appellants. The United States asserts a "question presented" but fails to undertake the burden of establishing it that would be required of one qualified to present it.

In the District Court the United States supported the Commission's order by answer setting out in extensive detail that the order is valid (R. 42-44). The United States filed a joint brief with the Commission in support of the order, and counsel for the United States made a separate oral argument in District Court in support of the order. The District Court entered a judgment that accorded with these requests of the United States.

Hence the United States is not "entitled to judicial review" of the Commission's order, since it is not a person "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute." Administrative Procedure Act § 10(a), 5 U.S.C. § 1009(a). *Lee* v. *Civil Aeronautics Board*, C.A.D.C. Cir., 225 F. 2d 950, 951 (1955); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955). Section 10(a) determines the right to review. *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line Railroad Co.*, 353 U.S. 436 (1957); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950).

The United States says, p. 10, "this brief * * * supports the appellants." That is not a correct statement. The United States expressly disagrees with and repudiates, p. 13, the sole ground of appeal asserted by appellants, that the Commission may not take existing railroad service into account in determining whether public convenience and necessity requires proposed motor carrier service in an area without motor carrier service.

The United States says, p. 2, that the "question presented" is whether the Interstate Commerce Commission erred "in rejecting Schaffer's application for authority to provide *a motor service superior to the rail service* which alone was available to shippers * * *." (Emphasis added.)

But no one has attempted to establish that "the whole record" shows that Schaffer proposes to furnish "superior service." That contention calls up for consideration "the whole record" before the Commission together with the entire range of the Commission's administrative judgment in dealing with "the whole record." All of that must be considered before it is possible to reach the question whether the motor carrier service proposed is a "superior service." Administrative Procedure Act § 10(e), 5 U.S.C. § 1009(e); *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488 (1951).

And there are two obvious faults in that contention:

(1) It was not made a ground of appeal (R. 371), and it is not stated as a "question presented" by any appellant.

(2) Even if the United States were qualified to assert this contention, it has made no attempt to do so; there is nothing in its brief that brings its contention within the "where presented" phrase of § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e). This phrase confines review of administrative orders to questions duly "pre-

sented" as required by the Act and by proper appellate practice. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955). The brief of the United States does not attempt to show that its contention is supported by the "whole record," or that the Commission's order is not supported by the "whole record," within the meaning of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488 (1951). The burden to make that showing is on one asserting it. *North Whittier Heights Citrus Assn.* v. *Natl. Labor Rel. Bd.*, C.A. 9 Cir., 109 F. 2d 76, 83 (1940), cert. den. 310 U.S. 632; *Steelco Stainless Steel* v. *Federal Trade Comm.*, C.A. 7 Cir., 187 F. 2d 693, 695 (1951); *Mangum Electric Co.* v. *Russell*, 263 U.S. 675 (1923):

> "The court declines, in the absence of a brief, to examine a lengthy record to determine whether the evidence contained therein overcomes the presumption attaching to the findings of the commission and two courts."

If it can be said that the United States can "confess error", or, to be precise, can confess what it conceives to be someone else's error, it is obvious that the right to "confess error" is not comprehended within and does not confer the right to the "judicial review", par. (a), of the "whole record", par. (e), of § 10 of the Administrative Procedure Act. One who "confesses error" is plainly not within the description of par. (a). A "confession of error" could not conceivably comprehend sustaining the burden described in the preceding paragraph.

But in any event the United States does not undertake that burden. The United States makes, pp. 14-15, a few fragmentary references to the record but these are so fragmentary and so uprooted and isolated from context that they prove, upon brief examination, to defeat the purpose for which they apparently were cited. We will

make that brief examination, solely for the purpose of showing how far short the United States falls in its attempt to support a contention that in any event is not before the Court. We will call attention very briefly to record not disclosed in the U.S. brief which is an integral part of matter referred to in the U.S. brief. The record not disclosed in the U.S. brief would have to be considered by the Commission in determining public convenience and necessity and by the Court in deciding the issue which the U. S. brief attempts to present, but the United States, though having the burden of full presentation, has not attempted to carry it.

The St. Paul, Minn., dealer referred to in the U. S. brief, p. 14, whose less-carload shipments from Vermont to St. Paul take from "3½ to 6 weeks," actually would make little use of the proposed motor carrier service if it were instituted. He receives a "very large share" of his Vermont granite in rail carload lots and he would continue to do so if the proposed service were approved (R. 75). He had one less-carload shipment between January 1 and June 13, 1952 (R. 51; 76) and thought he might use the proposed service "perhaps half a dozen times per year." He is "one of the larger dealers" in the St. Paul area (R. 76).

The Rockford, Ill. dealer referred to in the U. S. brief, p. 14, whose shipments are all less-carload, left the record wholly in doubt as to how much, if any, of his Vermont granite would be carried by Schaffer if the application were granted (R. 176-177). His only *definite* testimony is that at least part of his Vermont granite would continue to move by rail; how much, if any, of his traffic would move by truck is left wholly indefinite (R. 177). He likes to be able to pick up granite at the railroad station at his convenience any time of the day, and he receives an allowance for making the pick-up where the tariff permits (R. 176-177). This convenience is illustrated by the objection of another monu-

ment dealer to inconvenient delivery time by a motor carrier: "I have to get out on the truck in the middle of the night and help them unload their granite." (R. 156). This monument dealer is not mentioned in the U. S. brief.

The Aberdeen, S.D., dealer referred to in the U. S. brief, p. 14, does not want speedy service. He handles 20,000 to 30,000 pounds of Vermont granite per year. He would let his orders accumulate to 10,000 pounds and then arrange truck service for it (R. 168). He expressly repudiated any desire for delivery of each order as it came along (R. 167-168).

The "Vermont manufacturer who ships annually 1,600,000 pounds into the 16 western states covered by Schaffer's application," referred to in the U. S. brief, p. 15, testified that "a dealer, if he possibly can, will instruct us to hold the shipment until it can get into a pool car because of the rate" (R. 240). He testified that the average delivery time of his rail less-carload shipments from Vermont to the involved Midwest points was "from one week to a good two weeks. In some instances, more" (R. 228-229). The manufacturer's rail less-carload shipments to the sixteen involved states (those between and including Illinois, Texas, and Montana, R. 297) are a yearly total of 600,000 pounds, an average of 3,000 pounds per day (R. 232). It is obvious that Schaffer could not dispatch a truck every day to one or more destinations in those sixteen states with but 3,000 pounds pay load. The witness, while admitting he did not know, speculated that Schaffer would accumulate loads and make weekly trips to various areas (R. 236). That would make his delivery time approximate the present rail less-carload delivery time.

The testimony of the field representative of the association representing 67 Vermont manufacturers referred to in the U. S. brief, p. 15, was held to be hearsay and inadmissible by Division 5 of the Commission "insofar as it related

to any need that the 18 members may have for the proposed operation" (R. 20).

All of the foregoing record, not mentioned in the U. S. brief, was a part of the whole record, also not mentioned in the U. S. brief, on which the Commission within the permissible range of its administrative discretion could determine that the proposed service was not required by public convenience and necessity.

We have discussed briefly the only specific record items referred to in the U. S. brief, solely for the purpose of showing how fragmentary is its presentation of the question it says is presented. Even if the United States were qualified to assert this contention as a ground for reversal, it has not even made a start toward carrying the required burden of submitting the question to the Court.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

"Public Convenience and Necessity" Clauses of Various Statutes.

Railroads

Act of Feb. 28, 1920, 41 Stat. 477, 49 U.S.C. § 1(18). No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *

Radio

Act of June 19, 1934, 48 Stat. 1083, 47 U.S.C. § 307 (a). The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

Telegraph and Telephone

Act of June 19, 1934, 48 Stat. 1075, 47 U.S.C. § 214 (a). No carrier shall undertake the construction of a new line

or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: * * *

AIR CARRIERS

Act of June 23, 1938, 52 Stat. 987, 49 U.S.C. § 481 (d)(1). The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

WATER CARRIERS

Act of Sept. 18, 1940, 54 Stat. 941, 49 U.S.C. § 909 (c). Subject to section 910 of this title, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity, otherwise such application shall be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

SHAFFER TRANSPORTATION COMPANY, and AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court For The District of South Dakota, Northern Division.

MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE

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IN THE

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Appellants,

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Appellees.

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MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE

Now come John S. Burchmore and Robert N. Burchmore, as counsel for The National Industrial Traffic League, pursuant to paragraph 3 of Rule 42, and move the Court for leave to file a brief as *amicus curiae*.

The League is a nationwide organization of shippers via all forms of transportation, including railroads, motor carriers, water carriers, and air carriers, as well as freight

forwarders. The organization is dedicated to the promotion of sound, economic transportation, and its membership generally has a vital interest in the principles and policies of regulation of transportation pursuant to the National Transportation Policy and in the public interest.

The League, on behalf of its membership, as representative of the shipping public, has an interest in the granting of operating rights for highway transportation sufficient to meet the public need for such transportation. Consequently, the League is concerned with the interpretation by the Interstate Commerce Commission and the Courts of those provisions of the Interstate Commerce Act relating to such operating rights.

The Court has noted probable jurisdiction in two appeals that present questions in the determination of which the League believes that the public interest and need are legally significant.

No. 419, *Shaffer Transportation Company, et al.,* v. *United States of America,* presents the question whether the public is entitled to both railroad and motor carrier transportation upon request, or whether in the absence of existing motor carrier service the issuance of operating authority for a proposed motor carrier service may be withheld until the inadequacy of existing railroad service is proven.

In this case, the Commission denied the application for operating rights and the court below dismissed the suit of the applicant motor carrier to set aside the Commission's order. 139 F. Supp. 444. The League requests leave to file a brief as *amicus curiae* in support of appellants, urging particularly the right of the public under the statute to have both railroad and motor carrier modes of transportation authorized.

No. 101, *American Trucking Associations, Inc., et al.*, v. *United States of America, et al.* (Also No. 110, *Railway Labor Executives Association, et al.*, v. *United States of America, et al.*) presents the question whether a grant of new or additional motor carrier operating authority to a carrier that is a subsidiary of a railroad must, as a matter of law, be restricted to service that is auxiliary and supplemental to rail service, regardless of the public need for unrestricted service by such subsidiary.

In this case, the Commission issued an unrestricted certificate to the railroad subsidiary and the court below dismissed the actions of motor carriers and their organizations (and of the railway labor organization) to set aside the Commission's order. The League seeks leave to file a brief as *amicus curiae* in support of the appellees, arguing particularly that the public need for highway transportation should be the paramount consideration in the determination as to what, if any, restrictions should be placed upon highway service by railroad subsidiaries.

Opposing parties refuse consent

Upon application to the parties for consent as a preliminary to this motion, the Interstate Commerce Commission granted written consent to the League in both cases, notwithstanding that the interest of the League is in support of the Commission in No. 101, and opposed to it in No. 419. Further, written consent was granted in each case by the parties in whose support the League brief would be filed. However, in No. 419, the railroads refuse consent and in No. 101 the American Trucking Associations refuse consent.

Necessity for adequate presentation of the public interest

Except for the United States and Interstate Commerce Commission the parties to these proceedings clearly have an interest in preserving for themselves so far as they can the exclusive opportunity to provide transportation service, whether by railroad or by highway. Neither the railroad interests, on the one hand, nor the motor carriers and their associations, on the other, have any selfish interest in an adequate presentation of the question as to how the statutory provisions must be interpreted in the light of the public interest and need. Broadly speaking, the Interstate Commerce Commission is charged with the duties of regulation in the public interest according to the National Transportation Policy. And the Commission consents to the filing of League briefs in both cases, indicating the belief that an adequate presentation is made more likely by such filing.

The United States also has given its consent in writing to the requested filing.

Wherefore, counsel for The National Industrial Traffic League respectfully urge that leave be granted for the filing of a brief as *amicus curiae*.

Respectfully submitted,

JOHN S. BURCHMORE,
ROBERT N. BURCHMORE,

January, 1957.

Certificate of Service

I, Robert N. Burchmore, attorney for The National Industrial Traffic League, and member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of January, 1957, I served copies of the foregoing document upon the several parties thereto, as follows:

1. Upon the United States by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, 25, D. C.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with postage prepaid to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes with air mail postage prepaid to F. F. Chapman, Security Bank Bldg., Sioux Falls, South Dakota; and Amos M. Mathews, 280 Union Station Bldg., Chicago 6, Ill.

4. Upon appellants, by mailing copies in duly addressed envelopes with air mail postage prepaid to R. G. May, Security Bank Bldg., Sioux Falls, South Dakota; Donald A. Morken, 1100 First National-Soo Line Bldg., Minneapolis 2, Minn.; and Peter T. Beardsley and Fritz R. Kahn, 1424 Sixteenth St., N.W., Washington 6, D. C.

ROBERT N. BURCHMORE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

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INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court For The District of South Dakota, Northern Division.

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AN AMICUS CURIAE

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August, 1957.

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BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AN AMICUS CURIAE

THE INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

The League is a nationwide organization of shippers via all forms of transportation, including railroads, motor carriers, water carriers, and air carriers. The organization is dedicated to the promotion of sound economic transportation.

Broadly speaking, the League has an interest on behalf of its membership, as representative of the shipping public, in the principles and policies governing the regulation of transportation. It is, therefore, concerned with the inter-

pretation by the Courts and by the Interstate Commerce Commission of the provisions of the National Transportation Policy and the Interstate Commerce Act.

In particular, the League is interested in the granting of operating rights for motor transport sufficient to meet the public need for such transportation. It advocates the full development of a national transportation system by water, highway, and rail, as well as other means, and in the preservation of the inherent advantages of each form of transportation, according to the National Transportation Policy.

It is the position of the League that the public is entitled under the law to adequate service by motor vehicle as well as by rail; and the availability of one mode of service has no bearing upon the public need for the other.

In this case the Commission denied operating rights for motor transportation on the grounds that reasonably adequate rail service exists. This decision of the Commission, sanctioned by the Court below, is contrary to the position of the League and squarely presents the question whether the shippers of the country are entitled to service by all available forms of transport, or whether the Interstate Commerce Commission may determine that only the services of rail transport shall be utilized. Accordingly, the League membership, at its annual meeting in November, 1956, directed counsel to file, with leave of the Court, a brief as *amicus curiae* in support of appellants.

The League has no interest in the operating rights of any particular carrier and takes no position in any case with respect to whether a finding of public convenience and necessity for motor or rail service is supported by the evidence. The sole concern of the League is that the determination of the issue of public convenience and necessity for motor service shall not be dependent on the existence or adequacy as such of rail service.

SUMMARY OF ARGUMENT

(1) The Court below accepted at face value a statement of defendants that the Commission did not deny motor service on the grounds that rail service was in and of itself adequate. But the record discloses that the Commission's action was based on such grounds. This is so because the Commission's ultimate finding was based upon the conclusion that the service presently available is reasonably adequate; and the only service presently available is rail service. The Commission's motor carrier division had already denied motor service in respect of the territory where present motor service was available.

(2) In a determination of the public convenience and necessity for motor service the existence or adequacy of rail service is not a legally relevant consideration. The National Transportation Policy requires the Commission so to administer the licensing provisions of the statute as to preserve the inherent advantages of each mode of transport and to develop and preserve a national transportation system by all modes. Therefore the public is entitled to both motor and rail service wherever a need for service is shown, and the Commission is without power to restrict the licensing of motor service merely because rail service is available and is reasonably adequate. The Commission followed this principle for fifteen years, but erroneously departed from it in the base at bar. The principle is supported by the regulatory scheme as a whole, as is illus-

trated by the provisions of the Rule of Rate Making under which the reasonableness of the rates of one mode of transport may not be judged by the effect which they may have upon the traffic of another mode of transport.

(3) The League has no interest in the licensing of a particular carrier, motor or rail. It is very greatly concerned, however, with the principle involved and prays that the Court will hold as a matter of law that the existence or adequacy of rail service is not a legally relevant consideration in the licensing of motor service.

ARGUMENT

I.

THE EXISTENCE OF "REASONABLY ADEQUATE" RAIL SERVICE WAS ADOPTED BY THE COMMISSION AS GROUNDS FOR DENYING MOTOR SERVICE.

The learned Court below adopted verbatim in its opinion a statement in defendants' brief that "The Commission did not deny the application on the ground that rail service in and of itself was adequate." (R. 367) We think that statement is erroneous and that defendants have confused the record as to what grounds the Commission adopted for its denial of motor service. In any event it is necessary to settle the point in order to know what question is presented. As this Court has said in reviewing orders of the Interstate Commerce Commission, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M. St. P. & P. RR.*, 294 U.S. 499, 511 (1935).

As a matter of course, the ultimate finding of the Commission was that "applicant has failed to establish that the present or future public convenience and necessity require the proposed operation," (R. 37).

However, the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). In this case it is clear that the basis for the Commission's ultimate finding was the conclusion "that the service presently available is reasonably adequate." (R. 37). The context shows that when the Commission spoke of "presently available service", it was referring to rail service alone. For the Court below noted that the Commission's expe-

rienced trial examiner had recommended granting the proposed authority, and its motor carrier division had ordered the granting of the authority by a vote of two to one only after carving out of the territory sought to be served all that was shown to have adequate *motor* service. (R. 366) Therefore, when the case came before the entire Commission, the question was whether existing rail service constituted adequate grounds for denying the application in its entirety. It would not be reasonable to assume, and there is nothing in the record to indicate, that the entire Commission split six to four on the general proposition as to the degree of proof necessary to warrant a finding of public convenience and necessity for motor service. After twenty years of administration of the Motor Carrier Act, 1935, the considerations governing such a determination are too well understood for any such widespread disagreement with the Commission. We submit that the Commission did deny the application on the ground that rail service in and of itself was adequate. The Court below erred when it adopted a contrary conclusion and when it said (R. 367):

> It [the Commission] purported to weigh all of the salient factors constituting proof of need for the service and in the light of the entire record found that there wasn't any need for the service which could not be handled adequately by existing carriers, both motor and rail.

The record shows that the Commission had already given full effect to the existing motor carrier service and was dealing finally with shippers who had no motor service (R. 21, 22-3); that left only rail service as grounds for denying any new motor service.

II.

THE COMMISSION'S DECISION IS NOT IN ACCORDANCE WITH LAW.

We agree with defendants and with the Court below that a finding of present or future public convenience and necessity is for the Commission, upon which the courts will not weigh the evidence to reach a contrary finding, and that the statute does not specify the considerations by which the Commission is to be governed in making such finding (R. 363-4). But we submit that the Commission exceeds its power and acts contrary to the provisions of the statute, when it allows its finding as to proposed motor service to be prejudiced or influenced by the existence of rail service.

The Commission's finding was made under 49 U.S.C. 307(a), in the administration of which the Commission is required to carry out the National Transportation Policy. *Luckenbach S. S. Co.* v. *U. S.*, 122 F. Supp. 824, 827 (aff. 347 U.S. 984). The National Transportation Policy provides (49 U.S.C. preceding Sec. 1):

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as

> well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

The League respectfully submits that the congressional policy to develop a transportation system by highway, as well as by rail and water and other means, cannot be given effect if motor service is denied because reasonably adequate rail service exists. The "inherent advantages" of motor service cannot be recognized and preserved if the existence of reasonably adequate rail service may lawfully be taken as grounds for denying such motor service. "Impartial regulation of all modes of transportation" is not possible if motor service is restricted to protect existing rail service.

For fifteen years the Commission's administration of 49 U.S.C. 307(a) recognized the principle for which we contend. In the first volume of its motor carrier reports the Commission rejected the contention of the railroads that a motor carrier application should be denied on the grounds of reasonably adequate existing rail service, saying that shippers "are entitled to adequate service by motor vehicle as well as by rail". *Bowles Common Carrier Application*, 1 M.C.C. 589, 591.

Later, in *Crabb & Jespersen*, 30 M.C.C. 687, the Commission rejected the renewed contention that it should not allow both rail and motor service, but should determine which one should serve the public, saying (p. 689):

> The purpose of the act clearly contemplates the existence of transportation by highway as well as by rail. We have uniformly held, in numerous applications by motor carriers for authority to establish service which would be competitive with rail service, that the shipping public is normally entitled to an adequate

> system of transportation by motor vehicle as well as by rail.

Parenthetically, the Commission has also said, and recently, that it had never held that the mere absence of motor service, without more, would justify a grant of motor carrier authority. (R. 365) The League does not contest that statement; clearly the presence or absence of motor service is a relevant but not exclusive consideration. But that is beside the point here, which is that the existence of rail service is not a relevant consideration in determining the public need for motor service. Clearly, the field of Commission authority lies between the extremes of denying motor service because of existing rail service, and granting motor service because of the absence of motor service. In this case the Commission has departed from its long-standing adherence to the congressional scheme of regulation and has gone beyond permissible limits to deny motor service because rail service is available.

The principle that rail service is not a relevant consideration in determining the need for motor service is sustained by failure of efforts to amend the law so as to make such considerations relevant and requisite. Senate Bill 2753 in the second session of the 82nd Congress would have provided an amendment to 49 U.S.C. 307(a) by which it would have provided:

> In determining whether the proposed service, or any part thereof, is or will be required by the present or future public convenience and necessity the Commission shall give due consideration, among other things, to the transportation service already being provided by an existing carrier or carriers subject to part I, part II or part III and to the effect which the authorization of the proposed service would have on such existing carrier or carriers.

Extensive hearings were held on this bill in 1952, in which the League participated in opposition to the legislation. No action was taken by the Congress on that bill which would have changed the then standing policy of the Commission recognizing the right of the public to both forms of transportation.

The regulatory scheme contains other provisions which are consistent only with the principle that the existence of rail service is irrelevant to a determination of the need for motor service. In the rule of rate making, 49 U.S.C. 15a (2), the Commission is required in the exercise of its power to prescribe just and reasonable rates, to give due consideration, among other factors, "to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed". The Commission has correctly interpreted this section to mean that the effect of rail rates on motor traffic is an irrelevant consideration in determining the reasonableness of the rail rates. *Petroleum Products in California and Oregon*, 284 I.C.C. 287, 305 (1952).

Research discloses no judicial authorities on the question presented. The opinion of the Court below only touches upon the question because the Court did not understand that the Commission's denial was based on the existence of rail service. At that point in its opinion, the Court merely stated (R. 366) that the courts have sustained the Commission's view that the adequacy of existing service is to be determined without regard to whether the existing service is provided by the railroads or other motor carriers, citing *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945).

If the Court meant by that statement that the adequacy of existing service is to be determined without regard to whether the existing service is a motor service or a rail

service, then the statement is in error and is not supported by the *Parker* case. On the other hand, if the Court meant that the adequacy of existing service is to be determined without regard to whether the motor service involved is owned by a railroad or a motor carrier, then the citation of the *Parker* case sustains the statement, but it is not pertinent to the question presented here. That question of whether motor service should be performed by a railroad subsidiary or by a motor carrier is involved in another case now before this Court: *American Trucking Associations* v. *United States*, No. 6, October Term, 1957.

CONCLUSION

The League prays that the court will interpret 49 U.S.C. 307(a) and the National Transportation Policy to hold that the existence of reasonably adequate rail transportation service is not a legally relevant consideration in the determination by the Commission of the public convenience and necessity for motor service. The League further submits that the existence and adequacy of motor service is a relevant but not exclusive consideration in such a determination by the Commission.

Respectfully submitted,

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August, 1957.

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MOTION TO ALLOW AND TAX COSTS

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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

MOTION TO ALLOW AND TAX COSTS

Appellants respectfully move the Court to allow and tax their entire costs on appeal against appellee railroads,* and allege as follows:

1. On May 28, 1951, appellant Schaffer applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle of manufactured and rough granite between various points and places.

2. After oral hearings, in which the appellee railroads and one motor carrier participated in protest, the Commission's Division 5, by report and order dated May 24, 1954, authorized the operations sought to be performed substantially as requested. Only the appellee railroads sought reconsideration by the entire Commission of the action of its Division 5.

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* The appellee railroads, fifty-four in number, are listed at pages 45-46 of the Transcript of Record herein.

3. Pursant to several railroad petitions for reconsideration, Division 5, by order of November 12, 1954, reopened the proceeding for reconsideration on the same record. Thereafter, the entire Commission assumed jurisdiction of the matter.

4. By report and order dated February 7, 1955, the Commission reversed the decision of its Division 5, and denied Schaffer's application.

5. By order of May 16, 1955, the Commission authorized the intervention of appellant, American Trucking Associations, Inc., but denied its, and appellant Schaffer's, petitions for reconsideration.

6. By complaint filed August 8, 1955, in the United States District Court for the District of South Dakota, Northern Division, appellants sought to set aside the order of the Commission denying Schaffer's application. The appellee railroads intervened as defendants.

7. On May 25, 1956, the District Court entered its judgment in favor of defendants, including appellee railroads, and against plaintiffs (appellants).

8. On December 9, 1957, this Court reversed the judgment rendered by the District Court.

9. In reversing the judgment of the District Court, this Court made no order respecting the allowance of costs on appeal to appellants, and there is no provision in this Court's judgment for the allowance of such costs.

10. Rule 57(2) of the rules of this Court provides that in cases of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered.

11. In accordance with Rule 57(2) and long-established practice, appellants, as the prevailing parties, are entitled to recover their entire costs on appeal from appellee rail-

roads, in the absence of any order of this Court to the contrary. Cf. No. 87, *Public Utilities Comm. of California, et al.* v. *United Air Lines, Inc. et al.*, Journal, October Term, 1953, page 153.

12. Appellants do not seek to recover any costs from the United States or any officer or agency thereof and Rule 57(5) of the rules of this Court is inapplicable herein.

13. Appellants' costs on appeal are $1,782.76.

14. Appellee railroads have been primary parties to this proceeding from its inception; in fact, except for their petitions for reconsideration of the report and order of the Commission's Division 5, this matter would undoubtedly have never reached the courts.

15. WHEREFORE, appellants respectfully pray that this Court allow appellants to recover the entire sum of $1,782.76 as and for their costs on appeal of and from appellee railroads.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 29th day of January, 1958, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

4. On the National Industrial Traffic League, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Robert N. Burchmore, Esq., 2106 Field Building, Chicago 3, Illinois.

PETER T. BEARDSLEY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 20

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

BRIEF OF APPELLEE RAILROADS IN OPPOSITION TO APPELLANTS' MOTION TO ALLOW AND TAX COSTS

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In opposition to appellants' motion to allow and tax costs, appellee railroads state:

1. Appellees admit the facts stated in paragraphs 1 to 9, inclusive, of the motion.

2. As to the first nine paragraphs, and as to the other paragraphs of the motion, appellees deny that they state any grounds for the relief sought.

3. No filing fees or other costs are required by the Interstate Commerce Commission from parties to proceedings before it. Thus no party to the instant matter was entitled to recover costs in respect to any of the proceedings before the Commission.

4. Appellants' action in District Court for review of the Commission's order was opposed by the United States and by the Commission. Appellants' appeal in this Court was opposed by the Commission. The costs which appellants expended in connection with their appeal to this Court were necessitated entirely by the aforesaid opposition of the United States and the Commission. Such costs were neither occasioned by nor increased by the intervention of appellees in the Court action. It would have been necessary for appellants to expend such costs if appellees had not so intervened.

5. Appellants cite no authorities to sustain their position; and we know of no authorities, published or unpublished, where costs ever have been allowed under similar circumstances.

Appellants' motion should be denied.

Respectfully submitted,

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